TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~375~~ 101.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE PAINE LUMBER COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED AUGUST 18, 1905.

(19877.)

SUPREME COURT OF THE UNITED STATES.

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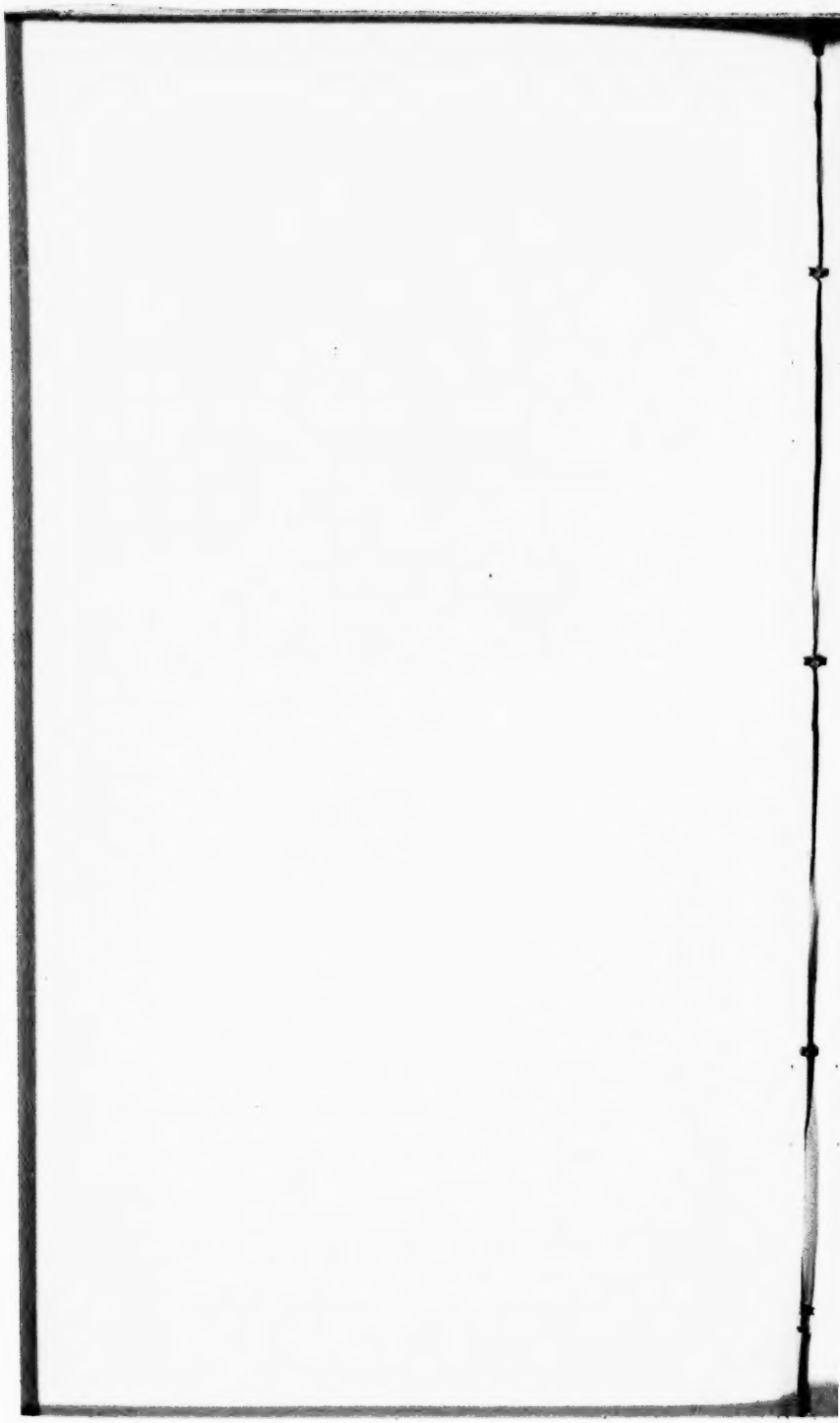

1 Circuit Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the Circuit Court of the United States for the Eastern District of Wisconsin, begun and held according to law at the city of Milwaukee, in said district, on the first Monday (being the third day) of October, A. D. 1904.

Present: The Honorable William H. Seaman, district judge, presiding.

Among other the following procedings were had, to wit:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT. } At law.

Be it remembered that heretofore, to wit, on the 28th day of January, A. D. 1902, came the U. S. district attorney and filed his præcipe for a summons against the above-named defendant, together with a complaint to be served; which præcipe for a summons is as follows:

Præcipe.

In the Circuit Court of the United States of America for the Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT.

Let a summons issue in the above-entitled action. Complaint transmitted herewith to be served with the summons.

Dated January 28, 1902.

(Signed) H. K. BUTTERFIELD,
United States Attorney, Plaintiff's Atty.

To EDWARD KURTZ, Esq.,
Clerk of said Court.

2 Whereupon a summons issued according to law with said complaint annexed, which are as follows:

Summons.

Circuit Court of the United States for the Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT.
[L. S.]

The President of the United States of America to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-

entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

The marshal of said district is hereby commanded to serve this summons, and make due return thereto.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the Eastern District of Wisconsin, this 28th day of January, in the year of our Lord one thousand nine hundred and two, and of the independence of the United States the 126th.

(Signed) EDWARD KURTZ, *Clerk.*

H. K. BUTTERFIELD, *U. S. Attorney,*
P. O. address, Milwaukee, Wis.

3 *Complaint.*

In the Circuit Court of the United States of America for the Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT.

The plaintiff, the United States of America, by H. K. Butterfield, its attorney, complains of the above-named defendant and alleges as its cause of action herein:

That the defendant, the Paine Lumber Company, is and was at all of the times hereinafter mentioned a corporation duly organized and existing within said district under and by virtue of the laws of the State of Wisconsin, and doing business as such within said State;

That upon information and belief, before and at the times hereinafter mentioned, the plaintiff was the owner and entitled to the immediate possession of a quantity of timber and logs, to wit, 7,500 ft. of basswood; 6,500 ft. of elm; 51,020 ft. of pine logs, which said logs were unlawfully cut and removed from the following described lands situated within the Eastern District of Wisconsin, to wit, the east half of the northwest quarter of section No. 35, in township No. 28, north of range 14, east of fourth principal meridian, and the northeast quarter of the southwest quarter of section 21 in said township;

That the plaintiff was during all the times hereinafter mentioned the lawful owner of said described real estate and entitled to the possession of all timber cut therefrom, or the product thereof.

2. That between the first day of January and the first day of April, A. D. 1899, at the county of Shawano, Wisconsin, within said
4 district, the defendant being then and there in possession of said logs, the said property of this plaintiff, unlawfully converted and disposed of the same to its own use and benefit, to the plaintiff's damage $536; and plaintiff alleges, upon information and belief, that the plaintiff necessarily incurred and actually expended the sum of $15.14 in ascertaining the extent of said trespass and measuring and scaling and arriving at the quantity of timber and logs converted by defendant and so unlawfully taken from said lands as hereinbefore alleged; and that defendant is liable to said plaintiff for the amount thereof.

Wherefore plaintiff demands judgment against the defendant for the sum of $551.14 (five hundred and fifty-one and fourteen one-hundredths dollars) damages, with interest thereon as provided by law, and the costs and disbursements of this action.

(Signed) H. K. BUTTERFIELD,
United States Attorney for the Eastern District of Wisconsin,
Plaintiff's Atty.

STATE OF WISCONSIN,
Milwaukee County, ss:

H. K. Butterfield, being duly sworn, on oath says that he is the United States attorney in and for the Eastern District of Wisconsin and as such officer appears as attorney for the plaintiff herein and makes this verification as such officer and attorney; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes them to be true; that his knowledge and the grounds of his belief are derived from statements of the officers of the General Land Office of the United States and official reports made therein in deponent's possession concerning the material facts herein set forth.

(Signed) H. K. BUTTERFIELD.

Subscribed and sworn to before me this 28th day of January, 1902.
EDWARD KURTZ, *Clerk.*

5 Summons and complaint returned: Served on the within-named Paine Lumber Company by showing A. B. Ideson, secretary of said company, this summons and complaint and delivering to him personally a copy thereof this third day of February, A. D. 1902.
Fees, $6.86.

(Signed) THOS. B. REID, *Marshal.*

MARCH 31, 1902.

This day came the defendant by its attorneys, Messrs. Thompsons, Hollister & Pinkerton, and filed its answer, as follows:

Answer.

In the Circuit Court of the United States for the Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT.

And now comes the defendant, the Paine Lumber Company (Limited) sued herein as the Paine Lumber Company, by Thompsons, Hollister & Pinkerton, its attorneys, and for answer to the plaintiff's complaint herein alleges and says:

1. The defendant denies each and every allegation, matter, and thing set forth or alleged in said complaint, except such as are hereinafter admitted.

2. The defendant admits that at all the times in said complaint mentioned it was and is a corporation duly organized and existing within the Eastern District of Wisconsin, under and by virtue of the laws of the State of Wisconsin, and doing business as such within said State, and that its correct and true corporate name was and is the Paine Lumber Company (Limited).

6 3. The defendant denies that it has any knowledge or information sufficient to form a belief as to whether or not the plaintiff was or is the owner of or entitled to the possession of the timber and logs in said complaint mentioned or any part thereof, or as to whether or not the same were unlawfully or otherwise cut or removed from the lands in said complaint described or from any part thereof, and therefore this defendant denies the said allegations of the complaint in that regard and the whole thereof.

4. The defendant denies that it has any knowledge or information sufficient to form a belief as to whether or not the plaintiff, at the times in the complaint mentioned, was or now is the owner of said real estate or entitled to the possession of timber cut thereon or the product thereof or any part thereof, and therefore denies the allegations of the complaint in that regard and the whole thereof.

5. And this defendant, further answering, denies that it ever unlawfully converted or disposed of the said logs or timber or any part thereof, or that it ever had possession thereof or of any part thereof, except as hereinafter stated, and the defendant denies that the plaintiff has in any way been damaged or injured by the acts or doings of this defendant.

6. The defendant denies that it has any knowledge or information sufficient to form a belief as to whether or not the plaintiff incurred or expended the sum of fifteen dollars and fourteen cents ($15.14) or any sum whatsoever in ascertaining the extent of the trespasses alleged in said complaint, or in measuring and scaling and arriving at the quantity of timber and logs alleged in the complaint to have been converted by this defendant or for any of said purposes whatsoever, and therefore denies the allegations of the complaint in that regard and the whole

7 thereof, and the defendant denies that the defendant is liable to the plaintiff for any sum or sums whatsoever.

7. The defendant, further answering, admits and alleges, that during the fore part of the year 1899, at the county of Shawano, in the Eastern District of the State of Wisconsin, it in good faith bought and purchased of one Thomas Gardner the amount of basswood logs mentioned in the complaint board measure and three thousand three hundred and ninety feet board measure of elm logs, which said logs were at said time landed on the banks of Weed's Pond, in the said county of Shawano; that the said basswood logs were then and there of the value of five dollars and twenty-five cents ($5.25) per thousand feet board measure, and the said elm logs were then and there of the value of four dollars and fifty cents ($4.50) per thousand feet board measure, and that said basswood logs and said elm logs were then and there at said place in the possession of said Thomas Gardner, who then and there claimed and represented himself to be the sole and absolute owner thereof and entitled to sell the same and collect therefor for his own use and benefit, and this defendant purchased and bought said basswood and elm logs of him at said time

and place in good faith and for value, believing him to be the bona fide and absolute owner thereof and entitled to sell the same, and receive the proceeds thereof for his own use and benefit, and the defendant then and there paid him for said basswood and elm logs the full value thereof, to wit: The sum of five dollars and twenty-five cents ($5.25) for each thousand feet board measure of said basswood logs, and the sum of four dollars and fifty cents ($4.50) per thousand feet board measure for said elm logs, and that thereafter in the regular course of its business the defendant sold and disposed of said basswood and elm logs, and that, as this defendant is informed and believes, they are the same
8 basswood and elm logs and timber claimed by the plaintiff in its complaint herein to have been its property.

8. This defendant, further answering, admits and alleges, that during the early part of the year 1899, at the county of Shawano, in the Eastern District of the State of Wisconsin, it in good faith bought and purchased of one Dan Davids the amount of pine logs at board measure mentioned in the complaint herein, then and there of the value of six dollars per thousand feet board measure, and then and there at said place in the possession of said Dan Davids, who then and there claimed and represented himself to be the sole and absolute owner thereof, and entitled to sell the same and collect therefor for his own use and benefit, and this defendant purchased and bought said pine logs of him at said time and place in good faith and for value, believing him to be the bona fide and absolute owner thereof and entitled to sell the same and receive the proceeds thereof for his own use and benefit, and the defendant then and there paid him the said sum of six dollars per thousand feet board measure therefor, and that thereafter in the regular course of its business the defendants sold and disposed of said logs, and that, as this defendant is informed and believes, they are the same pine logs claimed by the plaintiff in its complaint herein to have been its property.

II.

And for a further and separate defense to the plaintiff's complaint the defendant corporation alleges and says, that long prior to the commencement of this action, and on or about the 10th day of April, 1901, it paid to the plaintiff the sum of two hundred and seventy-one dollars and thirty-seven cents ($271.37), in full satisfaction and accord of all and every of the claims of the plaintiff contained or set out in its complaint herein, which said payment was in money deposited by the
9 defendant in the National Bank of Oshkosh, a United States depository, to the credit of the Secretary of the Treasury of the United States, and in the manner and form provided by law, and that said money was received and accepted by the plaintiff and paid into the Treasury of the United States, and that the plaintiff has ever since retained the same and now has the same, and that the same was accepted by it in full satisfaction and accord and in final settlement of all sum or sums of money claimed to be due or owing from this defendant to the plaintiff on the cause or causes of action alleged in the complaint.

Wherefore, in consideration of the premises, the defendant demands judgment that the plaintiff take nothing by its said action, that its com-

plaint be dismissed on the merits, and that the defendant have judgment for its costs and disbursements herein.

THOMPSONS, HOLLISTER & PINKERTON,
Defendant's Attorneys.

STATE OF WISCONSIN,
Eastern District of Wisconsin, Winnebago County, ss:

A. B. Ideson, being first duly sworn, on oath deposes and says that he is an officer, to wit, the secretary of the defendant corporation, the Paine Lumber Company, Limited, sued herein as the Paine Lumber Company, and makes this verification in its behalf, as he is duly authorized to do; that he has read the above and foregoing answer, and knows the contents thereof, and that the same is true to his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true; that his knowledge and the grounds of his belief on the subject are derived from the writings, papers, vouchers, checks, and receipts in reference thereto now in his possession, and from reports and statements of the officers, agents, and attorneys of the defendant, made to him in the regular course of the business of the defendant, which reports and statements he believes to be true, and as well from facts within his own personal knowledge; that the reason why this verification is not made by the defendant itself is that the defendant is a corporation.

(Signed) A. B. IDESON.

Subscribed and sworn to before me this 29th day of March, A. D. 1902.

CHAS. NEVITT,
Notary Public, Wisconsin.

JUNE 21, 1904.

The stipulation of the parties as to facts filed as follows:

Stipulation.

In the Circuit Court of the United States of America for the Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT.

It is hereby stipulated and agreed by the parties hereto by their respective attorneys, that the following facts are admitted to be true for the purposes of this action, and the same may be offered in evidence by either party hereto as admitted and stipulated facts in the case for any and all purposes of this action.

Statement of facts.

That the timber and logs involved in this case, to wit, 7,500 feet of basswood, 6,500 feet of elm, 51,020 feet of pine, were cut in the winter of 1898–1899 from the east half of the northwest quarter of section No. thirty-five (35), in township No. twenty-eight (28) north, of range fourteen (14) east of the fourth principal meridian, and the northeast quarter

of the southwest quarter of section twenty-one (21) in said township;
that said land was a part of the eighteen (18) sections then and
11 now constituting the Stockbridge and Munsee Reservation. That
prior to said time and now there was and is what is commonly known and called a business committee of the headmen or councillors of said Stockbridge and Munsee Indians, and there was and is a party among them commonly called the Miller faction which denied the authority of such committee and opposed it. But that such committee represented a large majority numerically of the Stockbridge and Munsee Indians, as well as a large majority of its councillors or headmen, and that such committee had and has a chairman, a secretary, and three other members. That such business committee claiming authority and right so to do, allowed the different members of the tribe, being of age and heads of families, to select certain particularly described lands, and such selections were made, and the said committee did allot such selections to the parties making the same. That among the selections and allotments so made as aforesaid was one by and to one Thomas Gardner, a member of said tribe of Stockbridge and Munsee Indians, his selection and allotment being the east half of the northwest quarter of section thirty-five (35), township twenty-eight (28), range fourteen (14). That among the selections and allotments so made as aforesaid, was one by and to one Daniel Davids, a member of said tribe of Stockbridge and Munsee Indians, his selection and allotment being the northeast quarter of the southeast quarter of section twenty-one (21). And they each claimed the right to cut and dispose of the timber upon the said selections for any purpose and particularly for clearing purposes or for support of family, and the logs or timber hereinbefore referred to were by them cut from a part of their several selections under their claim thereto.

That the United States has never recognized such allotments as legal, although the said Stockbridge and Munsee Indians have insisted that the
same were legal and valid allotments of such land, and have
12 claimed that they were made in accordance with and under
authority of the said treaties and arrangements between them and the United States.

That the defendant, after the cutting of said logs and timber, the said basswood and elm logs then being on Weed's point in the county of Shawano, and off of said Indian lands, in good faith and for a valuable consideration purchased the same of said Thomas Gardner, he claiming then and there to be the owner thereof and entitled to dispose of the same; and after the cutting of said logs and timber purchased the said pine logs of said Daniel Davids in good faith and for a valuable consideration, he then and there claiming to be the owner thereof and entitled to sell the same.

It is further stipulated and agreed, that if the defendant, on the facts and law herein stipulated and proved on the trial of this action shall be held liable for the value of said logs and timber at the time of the taking thereof by it, or while the same are in its hands, that the sum of $566.28 shall be and hereby is fixed and agreed upon as the measure of damages therefor.

It is further stipulated and agreed that if the defendant, on the facts and law herein stipulated and proved on the trial of this action, shall be

held liable for the value of said logs and timber at the time of the cutting thereof by the said Indians, or the value thereof at the time of the taking thereof by the defendant, less the additions in value made thereto by the said Indians in cutting, hauling, and banking the same, that then and in that case the measure of damages therefor shall be and is hereby stipulated to be the sum of $379.59.

But such stipulation as to the measure of damages shall not affect
13 or prejudice the right of the defendant to show or claim credit for the payment of any and all sums of money which it may under the evidence prove have been paid to the plaintiff therefor or should be credited thereon.

(Signed) H. K. BUTTERFIELD,
U. S. Attorney,
THOMPSONS, REED & PINKERTON,
Attys. for Defendant.

And same day, additional stipulation of facts filed as follows:

Stipulation.

In the Circuit Court of the United States of America for the Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT.

It is hereby stipulated and agreed by the parties hereto by their respective attorneys, that the following additional facts, over and above the facts recited in the stipulation already filed herein, are admitted to be true for the purposes of this action, and that this stipulation may be filed herein and the same effect given thereto as if said facts had been specifically proved upon the trial of this action.

It is stipulated that the timber involved in this action was cut at the time alleged in the complaint, respectively, by Thomas Gardner upon the east half of the northwest quarter of section 35, in township No. 28, north of range 14 east, and of Daniel Davids upon the northeast quarter of the southwest quarter of section 21, in said township; that each of the said Gardner and Davids was at the time of such cutting an Indian and a member of the Stockbridge and Munsie tribe of Indians, and that such timber was cut by them respectively upon their respective selections, or pieces which they claimed as in the former stipulation
14 recited, upon said Stockbridge and Munsie Indian Reservation, not for the purpose of cultivation, but for the support of their families, and that they cut it claiming and believing that they had the right so to do; that said Davids had never resided upon his selection and there was no house thereon, but that he was there temporarily at times; that at the time of the cutting of the timber in question by said Gardner he was living upon his selection; that shortly thereafter his wife died, and that he has never lived upon his selection since, except at intervals of two or three months at a time; that this action was commenced by the

service of process upon the Paine Lumber Company on February 3, 1902; that on the 10th day of April, 1901, the defendant deposited to the credit of the Secretary of the Treasury, special account No. 5, $271.37 as an offer of settlement for the logs purchased from the Stockbridge and Munsie Indian Reservation, being the logs involved in this suit, and that such deposit and payment was made by the defendant in accordance with its offer to settle the matters involved in this case for such sum, to be then paid the Government of the United States in accordance with such offer, and that of such sum no part thereof has ever been returned to the defendant, though thereafter and on or about the 17th day of March, 1902, the Government, through its attorney in this case, sent to the attorney for the defendant herein Treasury warrant No. 684 for the sum of $271.37, being the same amount which had been sent by the defendant to the plaintiff, as hereinbefore stated, which amount the defendant then and there refused to accept; that the amounts specified as the measure of damages in the stipulation already filed herein include the costs of the Government in estimating the amount of the timber alleged to have been unlawfully cut upon said selections.

Dated this 21st day of June, 1904, Oshkosh, Wis.

(Signed) H. K. BUTTERFIELD,
United States Attorney, Plaintiff's Attorney.
THOMPSONS, REED & PINKERTON,
Defendant's Attorney.

15 JUNE 21, 1904.

This day came the parties by their counsel, Mr. H. K. Butterfield, district attorney, appearing for the plaintiff, and Mr. John Thompson for the defendant, and the issue herein came on to be tried, when the parties entered into a stipulation in writing, waiving a jury, as herein filed, to wit: "In the Circuit Court of the United States for the Eastern District of Wisconsin. The United States of America, plaintiff, vs. Paine Lumber Company, defendant. It is hereby stipulated and agreed that a trial by jury in the above-entitled action be, and the same hereby is, waived. And it is further stipulated and agreed that this action may be tried by the court without a jury. Dated this 21st day of June, A. D. 1904. H. K. Butterfield, U. S. atty., attorney for the plaintiff. Thompsons, Reed and Pinkerton, attorneys for the defendant." And thereupon the said issue was tried by the court and submitted, when the court took the same under consideration.

And now at this same term, to wit, October term, 1904, and on the eighth day thereof, to wit, on the 13th day of October, A. D. 1904, the following proceedings were had, to wit:

16 THE UNITED STATES OF AMERICA
vs.
THE PAINE LUMBER COMPANY, LTD. } At law.

This day came the district attorney, Mr. H. K. Butterfield, and the defendant by its counsel, Messrs. Thompsons, Reed & Pinkerton, and this cause having been heretofore tried by the court pursuant to a stipulation of the parties waiving a jury, on consideration of the pleadings

and evidence submitted, and the arguments of counsel thereon, the court doth find the issue herein in favor of the defendant pursuant to findings of fact and conclusions of law herein filed.

Whereupon it is considered and adjudged by this court now here that the United States of America, plaintiff, take nothing by its writ, and that its complaint herein be and the same is hereby dismissed upon the merits without costs.

Judgment roll filed October 13th, A. D. 1904.

(Signed) EDWARD KURTZ, *Clerk.*

And which findings of fact and conclusions of law are as follows:

Findings of fact and conclusions of law.

In the Circuit Court of the United States of America for the Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT.

The issues raised by the pleadings in this action having regularly come on for trial at the June term, 1904, of the above-named court
17 held at the city of Oshkosh, in the said Eastern District of Wisconsin, and on the 21st day of June, 1904, in said term, and a trial by jury having been waived by written consent of the parties by their respective attorneys, filed with the clerk and assented to by the court, and a trial of said issues having been regularly and duly had by the court, the Hon. H. K. Butterfield, United States district attorney, appearing for the plaintiff, and Messrs. Thompsons, Reed & Pinkerton appearing for the defendant, and the court having heard the testimony and evidence offered by the respective parties and the stipulations as to certain facts filed herein, and the court having taken the matter under advisement and being now fully advised herein, finds and decides as follows:

FINDINGS OF FACT.

1.

That the defendant is and was during all the times mentioned in the complaint a duly incorporated Wisconsin corporation.

2.

That long prior to the commencement of this action and long prior to the acts alleged in the complaint the head men or council of the Stockbridge and Munsee Indians, claiming authority so to do under the treaties and arrangements with the United States, allotted to one Thomas Gardner, the east half of the northwest quarter of section thirty-five (35), township twenty-eight (28), range fourteen (14) east, of the fourth principal meridian, of the State of Wisconsin, and to one Daniel Davids the

northeast quarter of the southeast quarter of section twenty-one (21), township twenty-eight (28), range fourteen (14) east, of the fourth principal meridian, of the State of Wisconsin, said lands being a part of the tract of land given to the Stockbridge and Munsee Indians by the treaty of 1856, each of said Indians being a member of said tribe of Stock-
18 bridge and Munsee Indians and the head of a family, and the said allotments being made to them respectively as their separate and individual allotments and being the same lands described in the complaint herein.

3.

That thereupon Thomas Gardner and Daniel Davids entered into immediate possession of their respective allotments and each of them has ever since claimed to hold the same as his allotment and has constantly asserted his ownership and right to take the timber therefrom without restrictions under the said treaty and arrangements with the plaintiff.

4.

That no patent has ever been issued for either of said parcels of land and that the ownership of the same by said Indians has received no official sanction on the part of the plaintiff aside from the recognition of their respective rights to the occupancy of the parcels so claimed and held by them respectively as aforesaid.

And that their respective rights to the occupancy of their respective parcels of land allotted to them as aforesaid has been recognized by the United States.

5.

That the timber and logs involved in this case, to wit, 7,500 feet of basswood, 6,500 of elm, and 51,020 feet of pine, were cut in the winter of 1898–1899, upon said respective parcels of land, by the said Thomas Gardner and the said Daniel Davids, respectively, not for the purpose of clearing the land for cultivation, but for the purpose of providing means for the support of their families, and that such cutting by each of them was done in good faith, and each of them claiming and believing that he had the right to so cut for said purpose.

19 6.

That after said cutting, and in the summer of 1899, at Weed's Point, in the county of Shawano, Wisconsin, the said logs were bought by the defendant of said Thomas Gardner and Daniel Davids, the same then and there being at said Weed's Point and off of the said reservation, for a valuable and fair consideration.

7.

That the defendant bought the same in good faith, believing the said Thomas Gardner and the said Daniel Davids were the bona fide and absolute owners thereof, and that they respectively were lawfully entitled to sell the logs cut from their respective allotments.

8.

That at the time of the cutting of the timber in question the said Thomas Gardner was living upon his said allotment; that shortly thereafter his wife died, and that he has not since lived thereon except at intervals of two or three months at a time, but for the most part has lived elsewhere with his brother.

9.

That at the time of said cutting the said Daniel Davids had no house on his allotment and was only there at times temporarily.

10.

It is stipulated in this case that if defendant is liable for the value of the logs and timber at the time of taking or while in his hands that the measure of damages therefor be the sum of five hundred and sixty-six dollars and twenty-eight cents ($566.28), and that if it be liable for the value of said logs and timber at the time of the cutting thereof or at the time of the taking thereof by the defendant, less the additions in value made thereto by the Indians in cutting, hauling, and banking the same, then the measure of damages therefor shall be the sum of three hundred and seventy-eight dollars and fifty-nine cents ($378.59). The measure of damages in both cases includes the cost of the scale and estimate thereof made by the Government officials.

CONCLUSIONS OF LAW.

That the said Thomas Gardner and the said Daniel Davids, as such allottees, had the right to cut and sell the timber on their respective allotments for the purpose for which the same was cut and sold, and that the defendant is entitled to judgment herein in its favor and against the plaintiff, dismissing the plaintiff's complaint on the merits, but without costs.

Let judgment be entered accordingly.

(Signed) WM. H. SEAMAN, *Judge.*

October 13, 1904.

OCTOBER 18, 1904.

This day came the United States attorney and filed exceptions to the conclusions of law, as follows:

Exceptions to conclusions of law.

In the Circuit Court of the United Satets of America for the Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT.

And now comes the above-named plaintiff, the United States of America, by H. K. Butterfield, United States attorney, its attorney, and

makes and files these its exceptions to the court's conclusions of law made in said action and dated October 13, 1904, and filed herein:

First. The plaintiff excepts to the said entire conclusion of law,
21 for the reason that said conclusion of law is an erroneous conclusion of law upon the facts as found by the court, and is not warranted by the facts as found, and that the same is contrary to law.

Second. It specifically excepts to that part of the conclusion of law which reads as follows: That the said Thomas Gardner and the said Daniel Davids, as such allottees, had the right to cut and sell the timber on their respective allotments for the purpose for which the same was cut and sold," for the reason that said conclusion of law is contrary to law and not warranted by the facts as found.

Third. To that part of the conclusion of law which is that the defendant is entitled to judgment herein in its favor and against the plaintiff, dismissing the plaintiff's complaint on the merits, for the reason that the same is contrary to law, is not sustained by the facts and is an erroneous conclusion of law upon the facts as found.

Fourth. The plaintiff specifically excepts to the order of the court ordering judgment in favor of the defendant in said action, as such order is contrary to law and to the facts as found.

Fifth. It specifically excepts to the failure of the court to find that the plaintiff is entitled to judgment against the defendant for the value of the timber as found by the findings of fact, with costs, and to the court's failure to order such judgment.

Sixth. It specifically excepts to the court's failure to find as a conclusion of law upon the facts as found that the allottees, Thomas Gardner and Daniel Davids, had no right to cut and sell the timber on their respective allotments for the purpose for which the same was cut and sold, as set forth in the findings of fact, and that the defendant company acquired no title to the timber purchased by it from the said allottees, and that the said defendant company is liable to the plaintiff for the value of such timber, as found in the findings of fact, at the
22 time it was purchased by the said company from the said allottees, Thomas Gardner and Daniel Davids, with costs.

Seventh. It specifically assigns as error the entire conclusion of law as made by the court and further specifically assigns as error the failure of the court to find as a conclusion of law that the said allottees had no right to cut the timber for the purposes as found and had no right to sell the same, and for its failure to find that the defendant company by its purchase of said timber acquired no legal title thereto, and for the court's failure to find as conclusion of law that the defendant is indebted to the plaintiff for the value of the timber, as found by the findings of fact, together with costs, and for its failure to order judgment in favor of the plaintiff and against the defendant for the value of the timber, as found, with the costs.

Dated October 17, 1904.

(Signed) H. K. BUTTERFIELD,
United States Attorney, Plaintiff's Attorney.

23 *Opinion of the court.*

United States Circuit Court, Eastern District of Wisconsin.

UNITED STATES
vs.
TORREY CEDAR COMPANY.

UNITED STATES
vs.
PAINE LUMBER COMPANY.

August 8, 1904.

At law. Suits in trover to recover the value of timber cut for sale and sold by the Indian occupant from his alleged allotment in the Stockbridge and Munsie Reservation and purchased in good faith by the defendants, respectively. Trial before the court on stipulations waiving a jury.

H. K. Butterfield, U. S. attorney, for prosecution; Thompsons, Reed & Pinkerton, for the defendants.

SEAMAN, Judge.

The primary issue in these suits is whether the Indian allottees under the Stockbridge and Munsie treaty of 1856 (11 Stat., 663) and the act of Congress of 1871 (16 Stat., 404) were vested with sufficient title in their allotments to authorize the cutting of timber, for sale and not by way of improvements, without the approval of the Department of the Interior. The selection of the eighty-acre tracts by the several members in question under the treaty, and exclusive occupancy, each formally approved by the council of the tribe, are conceded facts; and while the Department has granted no certificate or patent thereupon and has not formally recognized the validity of the allotments, it has constantly recognized and protected the exclusive possession of each. As the allottees have complied with all the requirements on their part
24 for obtaining the allotment under the treaty, it is not deemed questionable that they are entitled to recognition as allottees, with all the rights intended by the treaty, pending the issue of a patent. The treaty granted the allotments to be located, and the certificate is mere evidence of authorized location, so that operation of the grant is presumptive. Best v. Polk, 18 Wall., 112, 118. The acts of August 15, 1894 (28 Stat., 30, vol. 2 Supp., p. 246), and February 6, 1901 (31 Stat., 760), appear to be applicable in such instances to authorize an action establishing their rights under the treaty. Hy-Yu-Tse-Mil-Kin v. Smith (C. C. A.), 119 Fed., 114; Sloan v. U. S., 118 Fed., 283.

The contention on behalf of the Government is that the case is in any view within the decision in U. S. v. Cook, 19 Wall., 591, wherein "the right of the Indian in the land" was defined as "that of occupancy alone," with the fee in the United States, so that cutting the timber beyond the needs for improving the land "would be waste and unauthorized." On the other hand, the allottees have constantly asserted ownership and right to take the timber without restriction under the treaty. The controversy thereupon is of long standing and is now presented for judicial determi-

nation in various criminal and civil actions. Tested alone by the doctrine upheld in United States v. Cook, supra, the theory of the prosecution is not well founded, as the title there involved is plainly distinguishable from that intended by the Stockbridge and Munsie treaty. That case arose under the Oneida treaty of 1838 (7 Stat., 566) growing out of the prior Menominee treaties, whereby the present Oneida Reservation was created, and by its express terms was "reserved to the said Indians to be held as other Indian lands are held"—merely a right of occupancy, as uniformly held in conformity with the early ruling in Johnson v. McIntosh, 8 Wheat., 574.

25 In the case at bar, however, it is manifest that no such limitation was made or intended. The Stockbridge and Munsie treaty of 1856 was entered into to provide for relocation of the remnant of the tribe in Wisconsin, as they were unwilling to remove to a reservation in Minnesota theretofore provided. It recites valuable retrocessions and releases to the United States and reserves a tract "near the south boundary of the Menominee Reservation" of sufficient extent to furnish individual allotments. The terms of the grant were substantially these: After survey into the usual subdivisions the council of the tribes, under the direction of the superintendent, shall "make a fair and just allotment among the individuals and families of their tribes," in eighty-acre tracts to heads of families and other classes named, and forty acres to others. The allottees "may take immediate possession thereof, and the United States will thenceforth and until the issuing 'of patents' hold the same in trust for such persons;" certificates are to be issued "securing to the holders their possession and an ultimate title to the land;" but "such certificates shall not be assignable, and shall contain a clause expressly prohibiting the sale or transfer by the holder" of such land. After ten years, upon application of the holder and consent of the council, "and when it shall appear prudent and for his or her welfare, the President of the United States may direct that such restriction on the power of sale shall be withdrawn and a patent issued in the usual form." In the event of the death of an allottee without heirs, before patent, the allotment was not to revert to the United States, but to the tribe for disposition by the council. It is further declared (art. 11): "The object of this instrument being to advance the welfare and improvement of said Indians, it is agreed, if it prove insufficient, from causes that can not now be foreseen, to effect these ends, then the President of the United States

26 may, by and with the advice and consent of the Senate, adopt such policy in the management of their affairs, as in his judgment may be most beneficial to them; or Congress may, hereafter, make such provisions of law as experience shall prove necessary."

Under the terms of this treaty the policy of earlier treaties to reserve to the Indians "to be held as other Indian lands are held"—a mere right of occupancy—was changed to intend an ultimate title in fee simple. Pending the patent, while the legal title is in the United States, the allottee was vested with the equitable title contemplated by the treaty (Crews v. Burcham, 1 Black, 352, 356), unless modified by act of Congress, or by concurrent action of the President and Senate, if therein subject to modification. The provision in restraint of alienation meantime "is not inconsistent with a fee simple estate." Libby v. Cark, 118

U. S., 250, 255. Assuming, as suggested in the argument (but not so ruling), that the provision for title to go to the tribe in default of heirs would turn it into a base or qualified fee, the allottee living "has the same rights and privileges over his estate as if it were a fee simple" (11 Am. & Eng. Ency. of Law, 2 ed., 369, and citations) and is not liable for waste. (Id. 374.) See U. S. v. Reese, 5 Dill., 405, F. C., 16137.

In 1871 an act of Congress (16 Stat., 404) provides for the sale of the lands of this reservation, excepting eighteen sections which were reserved for the allottees, and the tracts involved in these suits are within the portion so reserved. This act expressly recognized the rights of allottees under the treaty, declared the "lands assigned and allotted to be held inalienable" and on "reversion to become the common property of the tribe," and that the title be held by the United States until patent issues "in trust for the individuals and their heirs to whom
27 the same were allotted." A prior act of 1865 (13 Stat., 562) authorized homestead entries and applications for citizenship by members of this tribe, but does not touch the present inquiry, and no other Congressional action appears in reference to the reservation or allotments therein.

I am of opinion, therefore, that the title derived under the treaty and confirmed by the act of Congress is sufficient to authorize the cutting of timber for sale, unless restricted by other provisions of law applicable thereto, and that these cases are not within the doctrine of United States v. Cook, supra. See New York Indians v. U. S., 170 U. S., 1, and Jones v. Meehan, 175 U. S., 1, 21, as to effect of the treaty. In this view, however, another question arises, which impresses me as important and not free from difficulty, namely, whether the treaty right of these Indians is subject to restriction and is restricted by the general policy and legislation in respect of Indians on reservations.

The paternal policy of the Government over the Indians has been constantly exercised, and in so far as it is directed by Congress for their protection and control the questions arising thereunder "are beyond the sphere of judicial cognizance, and must be met by the political department" even though the terms of a treaty are thereby superseded. Thomas v. Gay, 169 U. S., 264, 271; Stephens v. Cherokee Nation 174, U. S., 445, 483; Lone Wolf v. Hitchcock, 187 U. S., 553, 566. In Lone Wolf v. Hitchcock, supra, the authorities are reviewed and the doctrine stated that Indians who have not "been fully emancipated from the control and protection of the United States are subject, at least so far as tribal lands are concerned, to be controlled by direct legislation of Congress." So it has been held that neither allotment nor citizenship relieves the Indian from restraint against alienation, and his lease or contract to surrender possession to a white man is inoperative.
28 (Eells v. Ross, 29 U. S. App., 59; Beck v. Flournoy Live Stock Co., 27 U. S. App., 618). Also, that the act of 1897 (29 Stat., 506), prohibiting sale of liquor to allottees while their land is held in trust by the Government, or they are under charge of an agent, is authorized under the constitutional power to regulate commerce with the Indian tribes and is applicable to a citizen allottee. Farrel v. United States (C. C. A.), 110 Fed., 942, 946. Whether the legislative power extends as well to the inhibition or restriction of these allottees in cutting timber

upon their allotments under the treaty is an inquiry not involved in these cases, unless such legislation appears. None is cited on the briefs, aside from section 5388 as amended in 1888 (sec. 5388, 3 U. S. Comp. Stat.), and I am satisfied that the general terms of this provision are not applicable to such allottees without other provisions to make the severance of timber unlawful. In reservations or allotments therein where the fee is in the United States and the Indians have right of occupancy only their cutting of timber for sale is waste and unlawful per se (U. S. v. Cook, supra; Pine River Logging Co. v. U. S., 186 U. S., 279, 284), so that the statute applies; but, as above indicated, the title of these allottees confers fee simple rights, and is not within such rule. Surely they are not guilty of "unlawfully cutting" their timber unless prohibited by some other statute. I have examined numerous provisions relating to the reservations and to the executive departments, and found no enactment which seems to authorize such interpretation. In Pine River Logging Co. v. United States, supra, a statute (25 Stat., 673) was considered, which provides that the President may authorize "the Indians residing on reservations or allotments, the fee to which remains in the United States," to cut and sell "dead timber standing or fallen" for their sole benefit. Thus authorized, the Indians made contracts with
29 the defendants limited "to dead and down timber" of quantities specified, but the limitations were disregarded both by the parties and by agents for the Government, and the contractors obtained timber greatly in excess (including green timber), paying, however, the contract prices. They were justly held liable to the Government for the excess as wilful trespassers. But neither that case nor the statute referred to are applicable to the case at bar. Both are predicated on the fact that the fee was in the United States, with "a right of occupancy" only in the Indians, and the opinion (pp. 284, 290) rests liability upon such conceded fact.

No statutory inhibition appearing, I am of opinion that the terms of the treaty control the issue; that the cutting of timber was within the rights of the allottees; and that the defendants, purchasing and paying therefor in good faith, without overreaching in any manner, and free from complicity or knowledge of any dispute as to title, are not answerable to the United States for the value. If any regulation of the executive department could have force by way of restriction, under the general authority of Congress, no such regulation is brought to my attention; and without intimating a ruling as to the power (either delegated or inherent) it may well be remarked that no regulation can be thus operative in any view against these allotments which is directed and predicated on the theory that the allottees have a right of occupancy alone.

The only precedent cited which impresses me as bearing on this inquiry is an opinion by Attorney-General Garland (19 Op. of Attorney-General, 232) in reference to the rights of allottees under the act of February 8, 1887 (24 Stat., 388), which is not without force as applicable to the allotments in question. The act referred to adopts a policy of allotments with analogous provision as to title, the United States holding "the land
30 thus allotted for the period of twenty-five years in trust for the sole use and benefit of the" allottee and his heirs, and then to be conveyed in fee unless the President extends the period; and any conveyance or "any contract made touching the same" before the expiration

of that time "shall be absolutely null and void." The opinion rules under the general policy that the trusteeship therein provided "is substituted for the guardianship heretofore exercised over the tribe" and intends that "no unlawful waste be committed either by the cestui que trust or any one else," so that "the allottee does not possess the right to cut and sell merchantable timber," but is subject to the doctrine of United States v. Cook, supra. An opinion from such source is strongly persuasive, and I have hesitated to depart from its reasoning and conclusions, but find no escape from the conflicting view above stated. Conceding that control and protection of the allottees were contemplated under the treaty and that with or without restraint in the cutting of timber the Government as trustee could protect them against imposition or fraud and prevent strangers from entering and cutting timber under purported contracts, it is quite another proposition to sustain a suit on the part of the Government to recover the value of timber purchased from the allottee in good faith, for which a fair price was paid. The interest of the Government would authorize recovery only for the benefit of the cestui que trust, and as the latter has suffered no injury in person or estate through the mere fact of purchase, no rule of law is suggested or known to me which would sanction such recovery under the conceded facts in these cases.

Findings will be prepared and submitted accordingly in favor of the defendants.

31 JULY 27, 1905.

This day came the district attorney and filed his assignment of error and petition for writ of error, which are as follows:

Assignments of error.

In the Circuit Court of the United States of America for the Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT.

Comes now the plaintiff in the above entitled action, and makes and files the following assignments of error upon which it will rely in its prosecution of the writ of error in the above entitled cause.

One.

That the United States Circuit Court in and for the Eastern District of Wisconsin erred:

In finding and deciding upon the facts as found, as a conclusion and matter of law, that Thomas Gardner and Daniel Davids, as allottees, as found in the second finding of fact made and filed herein, had the right to cut and sell the timber on their respective allotments for the purposes for which the same were cut and sold (such purposes being as defined in the fifth finding of fact, namely, not for the purpose of clearing the land for cultivation, but for the purpose of providing means for the support of their families.

Two.

That the said court erred:

In finding and deciding upon the facts as found, as a conclusion and matter of law, that the defendant is entitled to judgment
32 herein in its favor, and against the plaintiff, and dismissing the plaintiff's complaint on the merits.

Three.

That the said court erred:

Upon the facts as found, in ordering judgment to be entered in favor of the defendant dismissing the complaint upon its merits.

Four.

That the said court erred:

Upon the facts as found, in not finding and deciding as a conclusion and matter of law that the allottees, Thomas Gardner and Daniel Davids, had no right to cut and sell the timber on their respective allotments for the purpose for which the same was cut and sold, as found by the court in its findings of fact, and that the defendant company acquired no title to the timber purchased by it from them, and that the defendant is liable to the plaintiff for the value of the timber, as found in the tenth finding of fact, at the time it was purchased by the said company, to wit, in the sum of $566.28, together with interest thereon and costs.

Five.

That the said court erred:

Upon the facts as found, in not finding and deciding as a conclusion and matter of law that the said allottees, Thomas Gardner and Daniel Davids, had no right to cut the timber for the purposes as found, and had no right to sell the same.

Six.

That the said court erred:

Upon the facts as found, in not finding and deciding as a conclusion and matter of law that the defendant by its purchase of the timber, as found by the findings of fact, acquired no legal title thereto.

33 Seven.

That the said court erred:

Upon the facts as found, in not finding and deciding as a conclusion and matter of law that the defendant is indebted to the plaintiff for the value of the timber as found, to wit, $566.28, being the value at the time of the said defendant's purchase, together with interest thereon and costs.

Eight.

That the said court erred:

Upon the facts as found, in not finding and deciding as a conclusion and matter of law that the plaintiff is entitled to judgment in its favor against the defendant for the said value of the timber at the time of its purchase by the defendant as found, to wit, the sum of $566.28, together with interest and costs.

Nine.

That the court erred:

In not ordering upon the findings of fact judgment for the plaintiff and against the defendant for the value of the timber at the time of its purchase by the defendant as found in the sum of $566.28, together with interest upon said amount, with costs.

Ten.

That said judgment is contrary to law, and contrary to the facts as found in the findings of fact.

Wherefore the plaintiff, this plaintiff in error, prays that the judgment of the said court be reversed, and that directions be given ordering judgment for the plaintiff herein against the defendant
34 for the value of the timber at the time of its purchase by the defendant, as found in the findings of fact, namely, the sum of $566.28, together with interest thereon and costs.

(Signed) H. K. BUTTERFIELD,
United States Attorney,
Attorney for the Plaintiff and Plaintiff in Error.

Dated July 27, 1905.

Petition for writ of error.

In the Circuit Court of the United States of America for the Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT.

The plaintiff in the above-entitled case, the United States of America, feeling itself aggrieved by the court's conclusion of law made and filed in said action, and the judgment entered therein on the 13th day of October, A. D. 1904, comes now by H. K. Butterfield, United States attorney for the said district, and petitions said court for an order allowing said plaintiff to prosecute a writ of error to the honorable the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided.

And your petitioner will ever pray.

(Signed) H. K. BUTTERFIELD,
United States Attorney for the Eastern District of Wisconsin.

Dated July 27, 1905.

35 *Order allowing writ of error.*

At the July special term, A. D. 1905, of the Circuit Court of the United States of America of the Seventh Judicial Circuit in and for the Eastern District of Wisconsin, held at the court room, in the city of Milwaukee, Wisconsin, on the 27th day of July, in the year of our Lord one thousand nine hundred and five.

Present: The Honorable William H. Seaman, circuit judge.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT.

Upon motion of H. K. Butterfield, United States attorney for the Eastern District of Wisconsin, and upon filing a petition for a writ of error, and the assignment of errors,

It is ordered, that a writ of error be, and hereby is, allowed to have reviewed in the Supreme Court of the United States of America the judgment heretofore entered herein, without bond therefor.

By the court.

(Signed) WM. H. SEAMAN,
Circuit Judge.

Dated July 27, 1905.

And same day præcipe of district attorney to issue writ of error filed as follows:

Præcipe.

In the Circuit Court of the United States of America for the Eastern District of Wisconsin.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE PAINE LUMBER COMPANY, DEFENDANT.

Let a writ of error issue for the removal of the above-entitled cause to the Supreme Court of the United States, and upon issuing of such writ let the proper transcript be made and returned and the proper citation issue.

(Signed) H. K. BUTTERFIELD,
United States Attorney.

To EDWARD KURTZ, Esq., *Clerk.*

Dated July 27, 1905.

36 Whereupon a writ of error and citation issued returnable in thirty days and a copy of said writ of error lodged, in pursuance of the statutes in such made and provided, for the defendant in error.

37 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the Circuit Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that I have compared the foregoing with their originals now on file and of record in my office, and that the same is a true and correct copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case of The United States of America vs. The Paine Lumber Company.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 7th day of August, in the year of our Lord one thousand nine hundred and five and of the independence of the United States the 130th.

[SEAL.] EDWARD KURTZ, *Clerk.*

38 UNITED STATES OF AMERICA, ss.

The President of the United States to the honorable the judges of the Circuit Court of the United States of America for the Eastern District of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of the United States of America for the Eastern District of Wisconsin, before you, or some of you, between The United States of America, plaintiff and plaintiff in error, against The Paine Lumber Company, defendant and defendant in error, a manifest error hath happened, to the great damage of the said plaintiff, The United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the
39 United States, the 27th day of July, in the year of our Lord one thousand nine hundred and five.

[SEAL.] EDWARD KURTZ,
Clerk of the Circuit Court of the United States for the Eastern District of Wisconsin.

(Indorsed:) In the Circuit Court of the United States of America for the Eastern District of Wisconsin, The United States of America, plff. & plff. in error, vs. The Paine Lumber Company, dft. & dft. in error. Writ of error. Filed July 27, 1905. Edward Kurtz, clerk.

40 (Original.)

UNITED STATES OF AMERICA, ss.

To the Paine Lumber Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States of America for the Eastern District of Wisconsin, wherein the United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable William H. Seaman, judge of the Circuit Court of the United States for the said district, this 27th day of July, in the year of our Lord one thousand nine hundred and five.

WILLIAM H. SEAMAN,
Circuit Judge.

We accept service of this citation this 8 day of August, A. D. 1905.

THOMPSONS, REED & PINKERTON,
Attorneys for the Paine Lumber Company.

41 (Indorsed:) In the Circuit Court of the United States of America for the Eastern District of Wisconsin, The United States of America, plff. & plff. in error, vs. The Paine Lumber Company, deft. and deft. in error. Citation.

(Indorsement on cover:) File No. 19877. E. Wisconsin, C. C. U. S. Term No., 375. The United States, plaintiff in error, vs. The Paine Lumber Company. Filed August 18th, 1905. File No. 19877.

O

FILE COPY.

Office Supreme Court, U. S.
FILED.
MAR 16 1907
JAMES H. McKENNEY,
CLERK.

No. 101.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

THE PAINE LUMBER COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE PAINE LUMBER COMPANY. } No. 101.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The United States filed its complaint in trover against the defendant on January 28, 1902, by which it claimed damages in the sum of $541.14 for timber and logs cut and removed from the Stockbridge and Munsee Indian Reservation in Wisconsin between the 1st day of January and the 1st day of April, 1899, and sold to the defendant company.

The answer of the defendant was filed March 31, 1902 (R., 3), in which it set up that the company in good faith bought and purchased of one Thomas Gardner the amount of basswood logs mentioned in the complaint, and 390 feet, board measure, of elm

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logs; that the said basswood logs were of the value of $5.25 per thousand feet, board measure, and the elm logs were of the value of $4.50 per thousand feet, board measure, and that said logs were in the possession of the said Thomas Gardner, who claimed and represented himself to be the sole and absolute owner thereof and entitled to sell the same and collect therefor for his own use and benefit.

The defendant, further answering, set up that during the early part of the year 1899, it in good faith bought and purchased of one Dan Davids the amount of pine logs mentioned in the complaint, which were then of the value of $6 per thousand feet, board measure, and that said logs were in the possession of said Davids, who claimed and represented himself to be the sole and absolute owner thereof and entitled to sell the same and collect therefor for his own use and benefit.

The defendant, further answering, alleged that on or about the 10th day of April, 1901, it paid to the plaintiff the sum of $271.37 in full satisfaction and accord of all the claims of the plaintiff contained or set out in its complaint, which payment was made by money deposited by the defendant in the National Bank of Oshkosh, Wis., to the credit of the Secretary of the Treasury of the United States, in the manner and form provided by law. This alleged defense seems not to have been pressed at the trial.

No replication or other pleading after the answer of the defendant is shown by the record.

On June 21, 1904, the parties filed the following stipulation of facts:

> It is hereby stipulated and agreed by the parties hereto, by their respective attorneys, that the following facts are admitted to be true for the purposes of this action, and the same may be offered in evidence by either party hereto as admitted and stipulated facts in the case for any and all purposes of this action.
>
> STATEMENT OF FACTS.
>
> That the timber and logs involved in this case, to wit, 7,500 feet of basswood, 6,500 feet of elm, 51,020 feet of pine, were cut in the winter of 1898–1899 from the east half of the northwest quarter of section No. thirty-five (35), in township No. twenty-eight (28) north, of range fourteen (14) east of the fourth principal meridian, and the northeast quarter of the southwest quarter of section twenty-one (21) in said township; that said land was a part of the eighteen (18) sections then and now constituting the Stockbridge and Munsee Reservation; that prior to said time and now there was and is what is commonly known and called a business committee of the headmen or councillors of said Stockbridge and Munsee Indians, and there was and is a party among them commonly called the Miller faction which denied the authority of such committee, and opposed it, but that such committee represented a large majority numerically of the Stockbridge and Munsee Indians, as well as a large majority of its councillors or headmen,

and that such committee had and has a chairman, a secretary, and three other members. That such business committee, claiming authority and right so to do, allowed the different members of the tribe, being of age and heads of families, to select certain particularly described lands, and such selections were made, and the said committee did allot such selections to the parties making the same. That among the selections and allotments so made as aforesaid was one by and to one Thomas Gardner, a member of said tribe of Stockbridge and Munsee Indians, his selection and allotment being the east half of the northwest quarter of section thirty-five (35), township twenty-eight (28), range fourteen (14). That among the selections and allotments so made as aforesaid was one by and to one Daniel Davids, a member of said tribe of Stockbridge and Munsee Indians, his selection and allotment being the northeast quarter of the southeast quarter of section twenty-one (21). And they each claimed the right to cut and dispose of the timber upon the said selections for any purpose and particularly for clearing purposes or for support of family, and the logs or timber hereinbefore referred to were by them cut from a part of their several selections under their claim thereto.

That the United States has never recognized such allotments as legal, although the said Stockbridge and Munsee Indians have insisted that the same were legal and valid allotments of such land and have claimed that they were made in accordance with and under

authority of the said treaties and arrangements between them and the United States.

That the defendant, after the cutting of said logs and timber, the said basswood and elm logs then being on Weed's Point in the county of Shawano, and off of said Indian lands, in good faith and for a valuable consideration purchased the same of said Thomas Gardner, he claiming then and there to be the owner thereof and entitled to dispose of the same; and after the cutting of said logs and timber purchased the said pine logs of said Daniel Davids in good faith and for a valuable consideration, he then and there claiming to be the owner thereof and entitled to sell the same.

It is further stipulated and agreed that if the defendant, on the facts and law herein stipulated and proved on the trial of this action, shall be held liable for the value of said logs and timber at the time of the taking thereof by it, or while the same are in its hands, that the sum of $566.28 shall be and hereby is fixed and agreed upon as the measure of damages therefor.

It is further stipulated and agreed that if the defendant, on the facts and law herein stipulated and proved on the trial of this action, shall be held liable for the value of said logs and timber at the time of the cutting thereof by the said Indians, or the value thereof at the time of the taking thereof by the defendant, less the additions in value made thereto by the said Indians in cutting, hauling, and banking the same, that then and

in that case the measure of damages therefor shall be and is hereby stipulated to be the sum of $379.59.

But such stipulation as to the measure of damages shall not affect or prejudice the right of the defendant to show or claim credit for the payment of any and all sums of money which it may, under the evidence, prove have been paid to the plaintiff therefor or should be credited thereon. (R., 6.)

On the same day an additional stipulation of facts was filed as follows:

It is hereby stipulated and agreed by the parties hereto, by their respective attorneys, that the following additional facts, over and above the facts recited in the stipulation already filed herein, are admitted to be true for the purposes of this action, and that this stipulation may be filed herein and the same effect given thereto as if said facts had been specifically proved upon the trial of this action.

It is stipulated that the timber involved in this action was cut at the time alleged in the complaint, respectively, by Thomas Gardner upon the east half of the northwest quarter of section 35, in township No. 28, north of range 14 east, and of Daniel Davids upon the northeast quarter of the southwest quarter of section 24, in said township; that each of the said Gardner and Davids was at the time of such cutting an Indian and a member of the Stockbridge and Munsie tribe of Indians, and that such timber was cut by them, respectively, upon their respective selections, or

pieces which they claimed as in the former stipulation recited, upon said Stockbridge and Munsie Indian Reservation, not for the purpose of cultivation, but for the support of their families, and that they cut it, claiming and believing that they had the right so to do; that said Davids had never resided upon his selection, and there was no house thereon, but that he was there temporarily at times; that at the time of the cutting of the timber in question by said Gardner he was living upon his selection; that shortly thereafter his wife died, and that he has never lived upon his selection since, except at intervals of two or three months at a time; that this action was commenced by the service of process upon the Paine Lumber Company on February 3, 1902; that on the 10th day of April, 1901, the defendant deposited to the credit of the Secretary of the Treasury special account No. 5, $271.37, as an offer of settlement for the logs purchased from the Stockbridge and Munsie Indian Reservation, being the logs involved in this suit, and that such deposit and payment was made by the defendant in accordance with its offer to settle the matters involved in this case for such sum, to be then paid the Government of the United States in accordance with such offer, and that of such sum no part thereof has ever been returned to the defendant, though thereafter and on or about the 17th day of March, 1902, the Government, through its attorney in this case, sent to the attorney for the defendant herein Treasury warrant No. 684 for the sum of

> $271.37, being the same amount which had been sent by the defendant to the plaintiff, as hereinbefore stated, which amount the defendant then and there refused to accept; that the amounts specified as the measure of damages in the stipulation already filed herein include the costs of the Government in estimating the amount of the timber alleged to have been unlawfully cut upon said selections. (R., 8.)

On the same day the parties stipulated and agreed to waive a trial by jury, and the case was heard by the court upon the foregoing stipulated facts.

The court found the issue in favor of the defendant, and filed findings of fact and conclusions of law, which here follow (R., 10):

FINDINGS OF FACT.

1.

That the defendant is and was during all the times mentioned in the complaint a duly incorporated Wisconsin corporation.

2.

That long prior to the commencement of this action and long prior to the acts alleged in the complaint the head men or council of the Stockbridge and Munsee Indians, claiming authority so to do under the treaties and arrangements with the United States, allotted to one Thomas Gardner the east half of the northwest quarter of section thirty-five (35), township twenty-eight (28), range fourteen (14) east of the fourth principal meridian,

of the State of Wisconsin, and to one Daniel Davids the northeast quarter of the southeast quarter of section twenty-one (21), township twenty-eight (28), range fourteen (14) east of the fourth principal meridian, of the State of Wisconsin, said lands being a part of the tract of land given to the Stockbridge and Munsee Indians by the treaty of 1856, each of said Indians being a member of said tribe of Stockbridge and Munsee Indians and the head of a family, and the said allotments being made to them, respectively, as their separate and individual allotments, and being the same lands described in the complaint herein.

3.

That thereupon Thomas Gardner and Daniel Davids entered into immediate possession of their respective allotments, and each of them has ever since claimed to hold the same as his allotment, and has constantly asserted his ownership and right to take the timber therefrom, without restrictions, under the said treaty and arrangements with the plaintiff.

4.

That no patent has ever been issued for either of said parcels of land, and that the ownership of the same by said Indians has received no official sanction on the part of the plaintiff, aside from the recognition of their respective rights to the occupancy of the parcels so claimed and held by them respectively, as aforesaid.

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And that their respective rights to the occupancy of their respective parcels of land allotted to them, as aforesaid, has been recognized by the United States.

5.

That the timber and logs involved in this case, to wit, 7,500 feet of basswood, 6,500 of elm, and 51,020 feet of pine, were cut in the winter of 1898–1899, upon said respective parcels of land, by the said Thomas Gardner and the said Daniel Davids, respectively, not for the purpose of clearing the land for cultivation, but for the purpose of providing means for the support of their families, and that such cutting by each of them was done in good faith, and each of them claiming and believing that he had the right to so cut for said purpose.

6.

That after said cutting, and in the summer of 1899, at Weeds Point, in the county of Shawano, Wisconsin, the said logs were bought by the defendant of said Thomas Gardner and Daniel Davids, the same then and there being at said Weeds Point and off of the said reservation, for a valuable and fair consideration.

7.

That the defendant bought the same in good faith, believing the said Thomas Gardner and the said Daniel Davids were the bona fide and absolute owners thereof, and that they respectively were lawfully entitled to sell the logs cut from their respective allotments.

8.

That at the time of the cutting of the timber in question the said Thomas Gardner was living upon his said allotment; that shortly thereafter his wife died, and that he has not since lived thereon, except at intervals of two or three months at a time, but for the most part has lived elsewhere with his brother.

9.

That at the time of said cutting the said Daniel Davids had no house on his allotment and was only there at times temporarily.

It is stipulated in this case that if defendant is liable for the value of the logs and timber at the time of taking or while in his hands that the measure of damages therefor be the sum of five hundred and sixty-six dollars and twenty-eight cents ($566.28), and that if it be liable for the value of said logs and timber at the time of the cutting thereof or at the time of the taking thereof by the defendant, less the additions in value made thereto by the Indians in cutting, hauling, and banking the same, then the measure of damages therefor shall be the sum of three hundred and seventy-eight dollars and fifty-nine cents ($378.59). The measure of damages in both cases includes the cost of the scale and estimate thereof made by the Government officials.

CONCLUSIONS OF LAW.

That the said Thomas Gardner and the said Daniel Davids, as such allottees, had the right to cut and sell the timber on their respective

allotments for the purpose for which the same was cut and sold, and that the defendant is entitled to judgment herein in its favor and against the plaintiff, dismissing the plaintiff's complaint on the merits, but without costs.

Let judgment be entered accordingly.

Thereupon the United States attorney filed exceptions to the court's conclusions of law as follows (R., 12):

First. The plaintiff excepts to the said entire conclusion of law, for the reason that said conclusion of law is an erroneous conclusion of law upon the facts as found by the court, and is not warranted by the facts as found, and that the same is contrary to law.

Second. It specifically excepts to that part of the conclusion of law which reads as follows: "That the said Thomas Gardner and the said Daniel Davids, as such allottees, had the right to cut and sell the timber on their respective allotments for the purpose for which the same was cut and sold," for the reason that said conclusion of law is contrary to law and not warranted by the facts as found.

Third. To that part of the conclusion of law which is that the defendant is entitled to judgment herein in its favor and against the plaintiff, dismissing the plaintiff's complaint on the merits, for the reason that the same is contrary to law, is not sustained by the facts and is an erroneous conclusion of law upon the facts as found.

Fourth. The plaintiff specifically excepts to the order of the court ordering judgment in

favor of the defendant in said action, as such order is contrary to law and to the facts as found.

Fifth. It specifically excepts to the failure of the court to find that the plaintiff is entitled to judgment against the defendant for the value of the timber as found by the findings of fact, with costs, and to the court's failure to order such judgment.

Sixth. It specifically excepts to the court's failure to find as a conclusion of law upon the facts as found that the allottees, Thomas Gardner and Daniel Davids, had no right to cut and sell the timber on their respective allotments for the purpose for which the same was cut and sold, as set forth in the findings of fact, and that the defendant company acquired no title to the timber purchased by it from the said allottees, and that the said defendant company is liable to the plaintiff for the value of such timber, as found in the findings of fact, at the time it was purchased by the said company from the said allottees, Thomas Gardner and Daniel Davids, with costs.

Seventh. It specifically assigns as error the entire conclusion of law as made by the court and further specifically assigns as error the failure of the court to find as a conclusion of law that the said allottees had no right to cut the timber for the purposes as found and had no right to sell the same, and for its failure to find that the defendant company by its purchase of said timber acquired no legal title thereto, and for the court's failure to find as

conclusion of law that the defendant is indebted to the plaintiff for the value of the timber, as found by the findings of fact, together with costs, and for its failure to order judgment in favor of the plaintiff and against the defendant for the value of the timber, as found, with the costs.

The court's opinion will be found commencing at page 14 of the record. The assignments of error will be found commencing at page 18 of the record.

It appears that Thomas Gardner and Dan Davids, who sold the timber and logs to the defendant company, are Stockbridge and Munsee Indians; that they cut the timber and logs upon what they claim as their selections or allotments under the treaties with the Stockbridge and Munsee Indians and the acts of Congress relating thereto; that these selectors or allottees claimed the right to cut the timber for the purposes of sale, and that the defendant company, claiming that it believed the Indians had the right so to cut and sell, purchased the timber and logs from these two allottees. Thus the court will see that the issue in the case is the character of the title of Gardner and Davids and whether that title is sufficient to support the cutting of timber for commercial purposes.

Since the case was docketed in this court we have obtained through the Interior Department some additional facts as to these two allotments and have concluded that Thomas Gardner was within his legal rights in cutting and selling the timber, and we do not, therefore, press this writ of error so far as the

timber cut upon the allotment of said Gardner is concerned. As to that cut upon the selection or allotment of Davids, however, we stand upon the record and proceed to argue the case with the object of having the judgment of the court below reversed in so far as the timber cut upon Davids' selection is concerned.

The amount of money involved in the controversy now before the court will be found to be comparatively small. The case is pressed principally for the reason that there are several cases involving large amounts of money awaiting the decision of this court.

As the case involves the construction of a treaty it was brought directly to this court.

ARGUMENT.

It is necessary to review the treaty of 1856 and subsequent legislation before proceeding to the argument proper, and these will be considered in chronological order.

THE TREATY OF 1856. (11 ST., 663.)

The treaty with the Stockbridge and Munsee Indians of February 5, 1856, will be found in the 11th Statutes at Large, page 663. It commences with a recital of the original cession to the Stockbridge and Munsee tribe and subsequent retrocessions by the tribe to the United States. It further recites a history of these tribes, their dissensions, difficulties and vicissitudes, and that the treaty to be made is for the purpose of relieving the Indians of these com-

plicated conditions and to establish them comfortably together under the paternal care of the United States Government, and for the further purpose of enabling such individuals of the tribe as are qualified to manage their own affairs to exercise the rights and to perform the duties of the citizen.

The treaty proper, after providing for the retrocession by the Stockbridge and Munsee tribe of certain lands theretofore set aside for the use of the Stockbridge and Munsee Indians in the treaty with the Menominees of February 8, 1832, the relinquishment of $20,000, and $16,500 additional, invested by the United States in stocks for the benefit of the Stockbridge tribe, in conformity to article 9 of said treaty and all claims set up by and for the Stockbridge and Munsee tribe, or by and for the Munsees separately, or by and for any individuals of the Stockbridge tribe to certain annuities, and all such and other claims set up by or for them or any of them, provides as follows:

> ARTICLE II. In consideration of such cession and relinquishment by said Stockbridges and Munsees, the United States agree to select, as soon as practicable, and to give them a tract of land in the State of Wisconsin near the southern boundary of the Menomonee Reservation of sufficient extent to provide for each head of a family and others lots of land of eighty and forty acres, as hereinafter provided; every such lot to contain at least one-half of arable land, and to pay—to be expended for improvements for the said

Stockbridges and Munsees, as provided in Article IV—the sum of forty-one thousand one hundred dollars; and a further sum of twenty thousand five hundred and fifty dollars to enable them to remove.

ARTICLE III. As soon as practicable after the selection of the lands set aside for these Indians by the preceding article, the United States shall cause the same to be surveyed into sections, half and quarter sections, to correspond with the public surveys, and the council of the Stockbridges and Munsees shall, under the direction of the Superintendent of Indian Affairs for the northern superintendency, make a fair and just allotment among the individuals and families of their tribes. Each head of a family shall be entitled to eighty acres of land, and in case his or her family consists of more than four members, if thought expedient by the said council, eighty acres more may be allotted to him or her; each single male person above eighteen years of age shall be entitled to eighty acres; and each female person above eighteen years of age, not belonging to any family, and each orphan child to forty acres; and sufficient land shall be reserved for the rising generation.

After the said allotment is made, the persons entitled to land may take immediate possession thereof, and the United States will thenceforth and until the issuing of the patents, as hereinafter provided, hold the same in trust for such persons; and certificates

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shall be issued, in a suitable form, guaranteeing and securing to the holders their possession and an ultimate title to the land; but such certificates shall not be assignable and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land described therein. After the expiration of ten years, upon the application of the holder of such certificate, made with the consent of the said Stockbridge and Munsee council, and when it shall appear prudent and for his or her welfare, the President of the United States may direct that such restriction on the power of sale shall be withdrawn and a patent issued in the usual form.

Should any of the heads of families die before the issuing of the certificates or patents herein provided for, the same shall issue to their heirs; and if the holder of any such certificate shall die without heirs, his or her land shall not revert to the United States, unless on petition of the Stockbridge and Munsee council for the issuing of a new certificate for the land of such deceased person to the holder of any other certificate for land; and on the surrendering to the United States of such other certificate by the holder thereof the President shall direct the issuing of a new certificate for such land; and in like manner new certificates may be given for lots of land the prior certificates for which have been surrendered by the holders thereof.

The character of the title of the Indians who took allotments under this treaty must be determined

from the second paragraph of Article III. It is therein provided that the persons entitled to land, after receiving their allotments, may take immediate possession thereof and that the United States will thenceforth and until the issuing of patents, as thereinafter provided, hold the same *in trust* for such persons and certificates shall be issued, in a suitable form, guaranteeing and securing to the holders their possession and an *ultimate* title to the land; such certificates *shall not be assignable* and shall contain a clause expressly prohibiting the sale or transfer by the holders of the land described therein. After the expiration of ten years the holder of such certificate, with the consent of the Stockbridge and Munsee council, may apply for the withdrawal of the restriction on the power of sale, and, if it shall appear prudent, the President of the United States may direct such withdrawal and a patent shall be issued in the usual form.

The third paragraph of Article III provides that if any of the allottees shall die before the issuance of certificates or patents, the same shall be issued to their heirs, and if the allottee shall die without heirs the land shall not revert to the United States except for the purpose of exchange with some other holder of a certificate.

It is evident that the commissioner on the part of the United States and the sachem who executed this treaty on behalf of the tribe were by no means confident that the treaty would effectively reach all of

the difficulties with which the tribe were then confronted and that it was, to a certain extent, experimental, for by Article XI of the treaty it is provided:

> The object of this instrument being to advance the welfare and improvement of said Indians, it is agreed, if it prove insufficient from causes which can not now be foreseen, to effect these ends, that the President of the United States may, by and with the advice and consent of the Senate, adopt such policy in the management of their affairs, as in his judgment may be most beneficial to them; *or Congress may hereafter make such provisions by law as experience shall prove to be necessary.*

That the promise and guarantee to the allottees of an ultimate title to the land was improvidently made is evident from the provisions of the act of February 6, 1871, which we shall proceed to discuss.

THE ACT OF FEBRUARY 6, 1871 (16 ST., 404).

The first section of the act of February 6, 1871, provides that the two townships of land situated in the county of Shawano, State of Wisconsin, set apart for the use of the Stockbridge and Munsee tribe of Indians, shall, under the direction of the Secretary of the Interior, be examined and appraised in 80-acre lots according to public survey.

The second section provides for the advertisement for sale at public auction of said two townships and provides for the manner and place of sale. The proviso of section 2 is important, and is as follows:

> *Provided, however,* That the Secretary of the Interior is hereby authorized to reserve from

> sale a quantity of said lands not exceeding eighteen contiguous sections, *embracing such as are now actually occupied and improved*, and are best adapted to agricultural purposes, subject to allotment to members of the Indian party of said tribe as hereinafter provided.

Section 3 provides for the application of part of the proceeds of the sale of said lands to the expenses of the appraisal and sale.

Section 4 provides that the amount remaining after the expenses of the appraisal and sale shall be paid shall be added to other amounts due from the United States to the Indians.

Section 5 provides for the division of the amount found to be due the tribes, and then follows this proviso:

> *Provided, however*, That a part of said sum due the Indian party, not exceeding $30,000, may, on the request of the sachem and councilors of said tribe, be expended in securing a new location for said tribe and in removing and aiding them to establish themselves in their new home; and in case of their procuring and removal to such new location at any time, the said eighteen sections of land reserved for their use by the second section of this act shall be sold in the manner therein provided, and the proceeds thereof be placed to their credit as aforesaid.

Desiring to abrogate the promise of an ultimate title by patent made in the treaty of 1856, and pursuant to the authority granted by Article XI of the

treaty, Congress then, by sections 8 and 9 of the act of 1871, provided as follows:

> SEC. 8. *And be it further enacted*, That as soon as practicable after a suitable and permanent reservation shall be obtained and accepted by said tribe, *either at their present home or elsewhere*, the same shall, under the direction of the Secretary of the Interior, be surveyed and subdivided to correspond with the public survey, and the council of said tribe, under the superintendence of the agent of the United States, shall make a just and fair allotment of so much thereof (in compact form) as may be required among the individuals and families composing said tribe, as follows: Each head of a family consisting of four persons shall receive eighty acres of land, and if consisting of more than four persons, at the discretion of the council, eighty acres more may be assigned to him or her; each male person above the age of eighteen years, not included in any family, shall receive eighty acres; each female person above the age of eighteen years, not a member of any family, and each orphan child, shall receive forty acres; the lands assigned and allotted as aforesaid *shall be held inalienable*, and in case of the death of any person his or her right thereto shall descend to his or her heirs, if members of said tribe, and if he or she dies without heirs capable of inheriting the land shall revert to and become the common property of said tribe; there shall also be set apart and appropriated a lot, not exceeding forty acres, to be held

as common property, on which to erect a church, parsonage, schoolhouse, and other improvements necessary for the accommodation of said tribe: *Provided*, That if any female shall marry out of said tribe she shall thereby forfeit all right to hold any of said lands as if deceased.

SEC. 9. *And be it further enacted*, That the allotments contemplated in the previous sections of this act shall be made and a certified copy thereof returned to the Commissioner of Indian Affairs within one year after the reservation shall have been made and accepted by said tribe; and thereafter the title of the lands described therein *shall be held by the United States in trust for individuals* and their heirs to whom the same were allotted. The surplus lands embraced in such reservation remaining after making such allotments shall be held *in like manner by the United States*, subject to be allotted to individuals of said tribe who may not have received any portion of said reservation, or to be disposed of for the common benefit of said tribe: *Provided*, That no change or addition shall be made in the allotment returned to the Commissioner of Indian Affairs unless the same shall be approved by the Secretary of the Interior.

And, independently of the authority of Article XI of the treaty, Congress had a right to modify or repeal the treaty by legislative action. (*Thomas* v. *Gay*, 169 U. S., 264; *Stephens* v. *Cherokee Nation*, 174 U. S., 445; *Lone Wolf* v. *Hitchcock*, 187 U. S., 553.)

It is apparent that while some locations were made under the treaty of 1856, no certificates guaranteeing to the selectors an ultimate title to the land were issued. The proviso of section 2 of the act of 1871 reserved from sale eighteen contiguous sections of land, "*comprising such as are now actually occupied and improved,*" and it was these eighteen sections a survey and subdivision of which are provided for by section 8 of the act. That section and section 9 take up the eighteen contiguous sections of land and provide for the distribution thereof and the manner in which the land shall be held. The act abrogates the promise of a title by patent contained in the treaty, and provides that the land distributed shall be held *inalienable,* and section 9 provides that the land *shall be held by the United States in trust for individuals* and their heirs to whom the same were allotted. It is further provided by that section that the surplus land remaining after the allotments shall be made shall be held in like manner by the United States for the benefit of the tribe.

If any certificates guaranteeing title had been issued under the treaty, they would have been rendered null and void by the act of 1871, for it is not likely that Congress would have discriminated in such a material matter between the Indians who had taken allotments under the treaty of 1856 and those who had not done so but who were entitled to allotments under the act of 1871. After the passage of the act of 1871, therefore, all selections, whether made before or after the passage of that act, stood

upon the same basis, namely, that established by the act. The lands were to be held inalienable and the United States was to hold them in trust for the individuals and their heirs. And so with the surplus lands which were unallotted.

The seeming hardship of this legislation is explained by the act of March 3, 1893 (27 St., 744), by which Congress granted to all Stockbridge and Munsee Indians who had adopted the habits of civilized life and who had shown themselves capable of managing their own property an absolute title in fee simple, thus going far beyond the contemplation of the treaty of 1856, the provisions of which the act of 1871 had in part abrogated.

THE ACT OF MARCH 3, 1893 (27 St., 744).

The act of 1893 recites the treaty of 1856, and further recites the fact that by the interpretation placed by Government officials upon the act of 1871, many of the Indians had been excluded from participating in tribal funds and the right to occupy the reservation, and then proceeds to declare what Indians were entitled to a share in the funds and lands. The provision of the act of 1893 to which attention is invited, is contained in the last clause of the first section of the act. The first section in full is as follows:

> That all persons who were actual members of said tribe of Indians at the time of the execution of the treaty of February fifth, eighteen hundred and fifty-six, and their descendants, and all persons who became members of the

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> That all persons who were actual members of said tribe of Indians at the time of the execution of the treaty of February fifth, eighteen hundred and fifty-six, and their descendants, and all persons who became members of the

> tribe under the provisions of article six of said treaty, and their descendants, who did not in and by said treaty, and have not since its execution, separated from said tribe, are hereby declared members of said Stockbridge and Munsee tribe of Indians and entitled to their pro rata share in tribal funds and in the occupancy of tribal lands; *and all members who entered into possession of lands under the allotments of eighteen hundred and fifty-six and of eighteen hundred and seventy-one, and who by themselves or by their lawful heirs have resided on said lands continuously since, are hereby declared to be owners of such lands in fee simple, in severalty, and the Government shall issue patents to them therefor.*

It is convenient to explain to the court at this point why the Government does not press this case here so far as the timber and logs cut upon the selection of Thomas Gardner are concerned. Under the state of the record the Department of Justice was uncertain whether Thomas Gardner was within the provisions of the foregoing section, the stipulation of facts not clearly indicating his status. The facts as to his selection and residence thereon were ascertained through the Interior Department after the record reached this court, and as those facts indicate that Gardner is fairly within the act of 1893, it was decided to drop the case so far as the timber cut from his selection is concerned.

As stated earlier in the brief, however, the Government contends that Davids is not within the act of 1893 and that his title is only such as can be read out

of the treaty of 1856 and the act of 1871, and we shall now consider the question as to what was the exact character of that title and whether it is sufficient to support the cutting and sale of timber for commercial purposes. The record is defective in failing to show the date of the selection of Davids. For the convenience of the court the material portions of the stipulation of facts bearing upon this point will be quoted:

> That prior to said time (of institution of suit) and now there was and is what is commonly known and called a business committee of the headmen or councillors of said Stockbridge and Munsee Indians, and there was and is a party among them commonly called the Miller faction, which denied the authority of such committee and opposed it. But that such committee represented a large majority numerically of the Stockbridge and Munsee Indians. * * * That such business committee, claiming authority and rights so to do, allowed the different members of the tribe, being of age and heads of families, to select certain particularly described lands, and such selections were made, and the said committee did allot such selections to the parties making the same. * * * That among the selections and allotments so made as aforesaid was one by and to one Daniel Davids. * * * That the United States has never recognized such allotments as legal, although the said Stockbridge and Munsee Indians have insisted that the same were legal and valid allotments of such land, and have claimed that they were made in accordance with and under authority

> of the said treaties and arrangements between them and the United States (R., 7). * * * That said Davids had never resided upon his selection and there was no house thereon, but that he was there temporarily at times.

The court will see that it is impossible to determine from the record the date of Davids' selection. Whether it was before or after the act of 1893, however, makes no difference. If before the act of 1893, the stipulation of fact as to his nonresidence precludes him from enjoying the benefits of the act. If after, he was in the class of Indians who had not, up to that time, demonstrated their fitness for a title in fee simple and absolute control of their land by forsaking their nomadic and unstable habits and establishing a permanent home. At a later date, however, June 21, 1906 (34 Stat., 382), Congress decided to give all members of the tribe a fee-simple title in their allotments. It is the title as it stood at the time the timber was cut which we are to consider.

The court will observe that by both the treaty and the act of 1871 the allotments were to be made under the superintendence of the Indian agent. The stipulation of facts fails to show that this allotment to Davids was so made, but it is believed that as the Indians have done all on their part that they were required to do—and the Indian Department must have had knowledge through its agent that these allotments were being made—we should not contend here that this superintendence by the Indian agent should be held a *sine qua non*.

Under the treaty of 1856 and the act of 1871 the Indians had a mere right of occupancy in their lands.

The trial judge held that under the terms of the treaty, in part above quoted from, the policy of the earlier treaties with the Indians to reserve to them the mere right of occupancy in the lands upon which they lived was changed to intend an ultimate title in fee simple; that pending the patent, while the legal title is in the United States, the allottee was vested with the equitable title contemplated by the treaty, unless modified by a subsequent act of Congress or by concurrent action of the President and Senate; that the provision in restraint of alienation in the meantime is not inconsistent with a fee-simple estate; that while the Government's policy for the protection and control of the Indians is entirely within the power of the political department and beyond the sphere of judicial cognizance, no legislation abrogating or abridging the terms of the Stockbridge and Munsee treaty can be found, and that the terms of the treaty must control the issue in this case.

It is a curious fact that in his review of the treaty and subsequent legislation the learned trial judge seems not to have considered the act of 1893. It is equally strange that he should have held that the treaty has never been abridged by subsequent legislation when the act of 1871 so plainly had that effect. It will be remembered that the tract of land set aside for the tribe by the treaty was in lieu of the tract which had theretofore been given the tribe by the Menominee treaty, which tract was retroceded by the

treaty of 1856. It was provided that the selectors might take immediate possession of their selections and that until the issuance of patents the United States would hold the lands in trust for such selectors, and that certificates guaranteeing their possession and a title were to be issued to them. Apparently but little was done under this treaty, for the act of 1871 provided for a survey as soon as practicable after a suitable and permanent reservation should be obtained and accepted by the tribe *either at their present home or elsewhere.* The lands allotted were to be held *inalienable* and were to be held by the United States in trust for the individuals and their heirs. The surplus lands were to be held in like manner for the benefit of the tribe.

The history and the evolution of the policy of the Government respecting the Indian tribes are too well known to the court to require an elaborate discussion. While that policy has been to extend their right of occupancy in the lands granted to them by treaty or statute to a fee-simple title it will not be denied that the Government has always approached the question of a title of the latter character, with no restraint upon alienation, with extreme caution. As the guardian of the Indians and with a due regard to its obligations and responsibilities as such, the Government has awarded to each tribe and the members thereof only such title as their state of enlightenment would justify. This policy was adopted at an early date with the object of protecting the Indians from their own improvident habits and from the dissipation of their

property which would probably result from untrammeled negotiation with the commercial world.

The title of these Indians can not be determined by the application of the common law rules of real property or the doctrine of trusts and uses as found in that law and its modifications under the Statute of Uses. The question must be determined in the light of the history of each tribe, the general policy of Congress with respect to the Indians, and its intention as gleaned from the treaties and laws relating to each tribe. As said by this court in *Jones* v. *Meehan* (175 U. S., 1):

> The treaty must therefore be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

The treaty and the act of 1871 contain the word "trust" as defining the relation between the Government and the Indians. This trusteeship, however, is a mere substitution for the guardianship exercised over the tribe prior to the date of the Stockbridge and Munsee treaty (19 Op. Atty. Genl., 232).

In the earliier days of the Government the Indians were never given anything more than a right of occupancy in their lands. It is doubted whether the Government, in its original negotiation with any tribe, ever granted any greater title. (*Johnson* v. *McIntosh*, 8 Wheat., 574.) At the time that case was decided and for a long time thereafter the dis-

position of the Indians was such that they were liable to abandon their lands at any time, whereupon the possession attached itself to the fee without any grant or cession by the Indians. While the use of the lands by the Indians was confined to hunting, the Government at all times was willing to permit them to cut timber for agricultural or domestic purposes or for the purpose of improving the land. Indeed, this was encouraged, but it was never conceived that there was any permission to cut and sell timber to the white man, under such conditions as might be agreed upon, without the sanction of the Government.

The case of the *United States* v. *Cook* (19 Wall., 592), decided in 1873, holds that the presumption is against the authority of the Indians to cut and sell the timber, and that every purchaser from them is charged with this notice of presumption, and to maintain his title it is incumbent upon him to show that the timber was rightfully taken from the land. In that case the timber was cut upon the land reserved for the Oneida Indians, and the provision of the treaty as to tenure is "as other Indian lands are held." The act of 1871, relating to the Stockbridge and Munsee tribe, contains no habendum clause stronger than that in the Oneida treaty. In both cases a reservation of certain land is made for the Indians and in the case of the Stockbridge and Munsee tribe a further provision is made for partition of the lands among the individual members of the tribe. The treaty of 1856 gave them the right to immediate

possession of the lands, and both that treaty and the act of 1871 declared that the lands should be held inalienable.

If, in the early days, an Oneida Indian had abandoned his land and had shown no intention of adopting the habits of civilized life, the right of possession on the part of the Government would have attached itself to the fee which it had retained. Similarly, if a Stockbridge and Munsee Indian who had taken land under the treaty of 1856 and the act of 1871 had abandoned his land prior to the act of 1893, he would have forfeited all right to his allotment and the Government would have thereupon held the land in trust for the common use of the tribe. Prior to the act of 1893 these Indians had no greater title than did the Oneida Indians. That title was a mere right of occupancy. That the land could not be sold is perfectly clear. How, then, could the timber, which while standing is a part of the realty, be rightfully cut and sold? We quote from the Cook case:

> The timber while standing is a part of the realty, and it can only be sold as the land could be. The land can not be sold by the Indians, and consequently the timber, until rightfully severed, can not be. It can be rightfully severed for the purpose of improving the land or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale. Its severance under such circumstances is, in effect, only a legitimate use of the land.

It follows from this decision that as long as the land itself is inalienable the sale of the timber is likewise prohibited.

Since the case at bar was tried the Circuit Court of Appeals for the Ninth Circuit has decided the case of *United States* v. *Gardner* (133 Fed., 285). That case involved the right of the Indians to cut and sell, for commercial purposes, timber upon lands allotted to them in severalty under the general allotment act of February 8, 1887 (24 Stat., 388), which provides that the United States shall hold such lands in trust for the allottee or his heirs for the period of twenty-five years, or so much longer as the President may determine, and then convey the same in fee to such allottee or his heirs. It will be observed that the Indians entitled to the benefit of the act of February 8, 1887, had an absolute promise of a title in fee simple after the lapse of twenty-five years, subject to an extension of the time by the President. This is practically the same title as that contemplated by the Stockbridge and Munsee treaty of 1856.

Certainly the title of the Stockbridge and Munsee Indians is no greater than that taken under the act of 1887. And as to the Indians who took under the act of 1887, the Circuit Court of Appeals held that the Indians had no right to cut and sell timber from their allotments, basing its decision upon the case of the *United States* v. *Rickert*, 188 U. S., 432, in which this court was called upon to consider what interest, if any, the Indian allottee acquired in the land allotted to him under the act of 1887. The court specifically held that the United States retained the legal title to

such lands; that the only right the Indians had in the lands was that of occupancy; and that the lands were not subject to State or local taxation. Quoting from the Gardner case (p. 288):

> The court (Supreme Court in Rickert case) further adverted to the facts that the lands are held by the United States in execution of its plans relating to the Indians without any right in the latter to make contracts in reference thereto, or to do more than occupy and cultivate them; that the Indians are yet wards of the nation, in a condition of tutelage or dependency; that they occupy the lands with the consent and authority of the United States, and under a national policy by which the Indians are to be maintained, as well as prepared for assuming the habits of civilized life and citizenship, in view of which considerations "there arises the duty of protection, and with it the power." The principles announced in that case are decisive of the present case and lead directly to the conclusion that the United States had both the title to the land and the capacity to bring the action.

The opinion of Attorney-General Garland, *supra*, is to the same effect. Therein it was concluded that the allottees under the act of 1887 do not possess the right to cut and sell merchantable timber, except such as may be necessary to cut in clearing the land for agricultural or grazing purposes or to erect suitable buildings thereon. The learned trial judge referred to this opinion, saying that while it is not without force as applicable to the allotments in the

case at bar and while an opinion from such a source is strongly persuasive, he felt constrained to depart from it.

Before concluding this argument it may be well to refer briefly to the several cases mentioned in the opinion of the trial judge. The case of *Crews et al.* v. *Burcham et al.* (1 Black, 352) arose under the treaty of 1832 with the Pottawatomie tribe. By that treaty certain reservations of land were made for several individuals, which reservations were to be selected by the President of the United States and patents were to be issued therefor. There was no restriction on the power of alienation; indeed, the intention to give them an immediate title in fee simple was plain. The court held that such an individual could convey the equitable title pending the issue of patent.

In the case of *New York Indians* v. *United States* (170 U. S., 1) the treaty on its face granted to certain persons a title in fee simple. The only question was whether the grant was one in præsenti, and it was held that it was.

In the case of *Jones* v. *Meehan* (175 U. S., 1) certain reserved lands were by the treaty "hereby ceded" to certain chiefs of the tribe. It was there held that unless a treaty or act of Congress prohibited alienation, the individuals took a grant in fee.

Pine River Logging Co. v. *United States* (186 U. S., 279) was a case in which the Government brought suit for timber cut upon the Mississippi Chippewa Reservation and was defended on the ground that

the timber was taken under the statute allowing the Indians to sell "dead and down" timber. It appeared that while some of the timber cut and sold was of that character, a large part of it was green growing timber. It appears from the opinion of the court that it was conceded by all parties that the Indians have nothing more than a right of occupancy in their lands. By reference to the treaty (7 Stat., 565) it will be seen that the title given to the Indians was even greater than that given to the Stockbridge and Munsee Indians. The land could be alienated provided the transfer were approved by the Secretary of the Interior.

We respectfully submit that the judgment of the court below should be reversed.

MEASURE OF DAMAGES.

A further question arises as to the measure of damages. As the case was tried upon stipulated facts and a waiver of the jury it is presumed that the court, if the judgment below shall be reversed, will assess the damages. Unfortunately, the record is in such condition that the specific amount of money, under whatever rule the court may lay down, can not be ascertained, but we respectfully ask that the measure of damages be declared and the case remanded for further proceedings.

The complaint sets up the conversion of 7,500 feet of basswood, 6,500 feet of elm, and 51,020 feet of pine logs, of the value of $536. The complaint asks for judgment for this amount and the additional

amount of $15.14, being the amount necessarily incurred and actually expended in ascertaining the extent of trespass, measuring, and scaling, etc., with interest and costs. The defendant alleges in its answer that it in good faith bought and purchased of Gardner the amount of basswood logs mentioned in the complaint and 3,390 feet board measure of elm logs, which said logs were at the time of purchase landed on the bank at Weeds Point; that the said basswood logs were then and there of the value of $5.25 per thousand feet board measure and the said elm logs were then and there of the value of $4.50 per thousand feet board measure, and that said basswood logs and said elm logs were then and there at said place in the possession of Thomas Gardner, who then and there claimed and represented himself to be the sole and absolute owner thereof and entitled to sell the same. The answer further alleges that the defendant, in good faith, bought and purchased of Daniel Davids the amount of pine logs mentioned in the complaint, such logs being of the value of $6 per thousand feet board measure; that said logs were in the possession of Davids, who represented himself to be the sole and absolute owner thereof and entitled to sell the same.

The stipulation of facts contains these items:

> That the defendant, after the cutting of said logs and timber, the said basswood and elm logs then being on Weeds Point, in the county of Shawano, and off of said Indian lands, in good faith and for a valuable con-

sideraton, purchased the same of said Thomas Gardner, he claiming then and there to be the owner thereof and entitled to dispose of the same; and after the cutting of said logs and timber purchased the said pine logs of said Daniel Davids in good faith and for a valuable consideration, he then and there claiming to be the owner thereof and entitled to sell the same.

It is further stipulated and agreed, that if the defendant, on the facts and law herein stipulated and proved on the trial of this action, shall be held liable for the value of said logs and timber at the time of the taking thereof by it, or while the same are in its hands, that the sum of $566.28 shall be and hereby is fixed and agreed upon as the measure of damages therefor.

It is further stipulated and agreed that if the defendant, on the facts and law herein stipulated and proved on the trial of this action, shall be held liable for the value of said logs and timber at the time of the cutting thereof by the said Indians, or the value thereof at the time of the taking thereof by the defendant, less the additions in value made thereto by the said Indians in cutting, hauling, and banking the same, that then and in that case the measure of damages therefor shall be and is hereby stipulated to be the sum of $379.59.

As the case is not pressed here as to the logs cut from the selection of Thomas Gardner, the court will see that it is impossible to ascertain from the

record, upon any theory, the exact amount of damages for the timber cut upon the selection of Daniel Davids. As to the measure of damages we submit the following: This court in the Cook case held that the presumption is against the authority of the Indians to cut and sell the timber, and that every purchaser from them is charged with this notice of presumption, and to maintain his title it is incumbent upon him to show that the timber was rightfully taken from the land. The defendant in this case has added nothing to the value of the logs and timber. The enhanced value arises from the cutting, hauling, and banking the same at Weeds Point by the Indians. In the Pine River Logging Company case the court followed the rule laid down in *Woodenware Company* v. *United States*, 106 U. S., 432. In the Pine River case it was conceded that the Indians had only a right of occupancy in their lands, and the court held that as to the timber cut by the Indians, including green and growing timber, in excess of their authority, the defendant was liable for the value of the logs as they were banked upon the stream near where they were cut.

HENRY M. HOYT,
Solicitor-General.

HENRY C. LEWIS,
Special Assistant to Attorney-General.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

No. 101.

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Plaintiff in Error,

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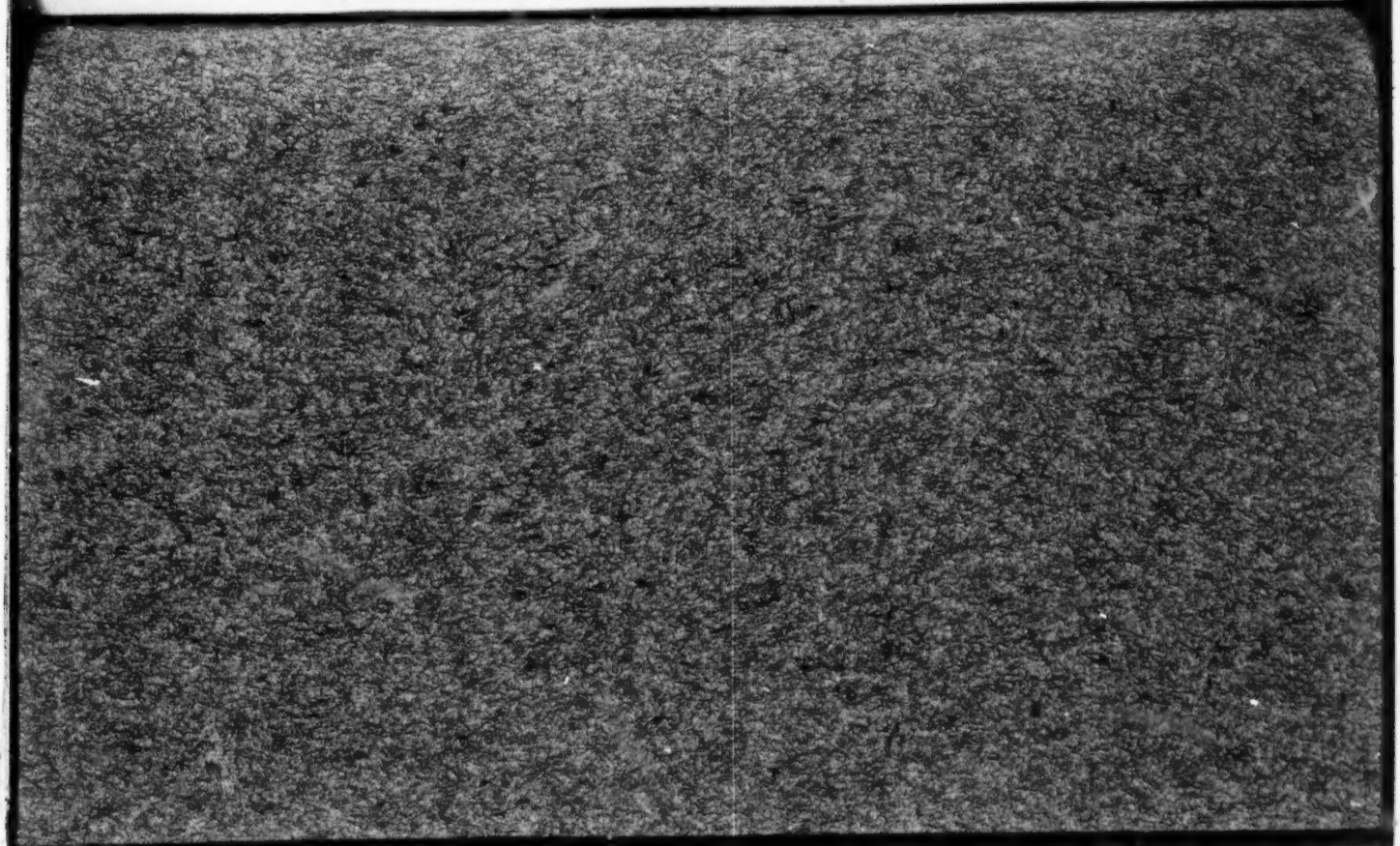

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BRIEF FOR THE PAINE LUMBER COMPANY.

As this case involves somewhat the treaty obligations between the United States and the Stockbridge Indians, we deem it important to briefly review the history of the relations between them.

STATEMENT.

"The Stockbridge Indians came originally from Massachusetts and New York."

At the time of the Revolution, they were christianized and were settled in New Stockbridge, New York, on the lands of the Oneida Indians, one of the Six Nations. Some of their citizens were soldiers in the American army in the War of the Revolution, and held commissions; many of them were well educated.

Wisconsin Historical Collections, Vol. 15, page 39.

The original name of the tribe was Muhheconunck.

Ibid. Page 6.

Of the Six Nations, the Oneidas and the Tuscaroras, and the friendly Indians living with the Oneidas (Stockbridge) were on the side of the colonies, and the others sided with the British.

By the treaty of Oct. 22, 1784, (Vol. 2, Indian Laws and Treaties, page 3), the Oneidas and Tuscaroras were secured in the possession of the lands on which they were settled.

By the treaty of Nov. 11, 1894 (Vol. 2, Indian Laws and Treaties, page 27) by Article 2 thereof, the title of the Indians and **"their Indian friends residing thereon and united with them"** was acknowledged, with the provision that "said reservations shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

By the treaty of Dec. 2, 1794 (Vol. 2, Indian Laws and Treaties, page 29), the assistance and loyalty of the Oneida, Tuscarora and Stockbridge Indians were officially recognized, and they were partially reimbursed for their losses during the Revolution, their homes having been pillaged during the war.

In 1808-10, when the plan of forming settlements for the eastern Indians in the White river country in Indiana was in contemplation, some of the leading Stockbridge Indians were in favor thereof, and prior to 1818 about 800 of them removed to Indiana.

Wis. Historical Collections, Vol. 15, page 41.

Subsequently the Stockbridge Indians purchased some lands on the Fox river in Wisconsin, of the western Indians, and some of them removed there. Some question arising as to their rights there, under a tentative understanding with the United States, the Stockbridge Indians removed to two townships of land, on the east side of Winnebago Lake, in the state of Wisconsin, containing 46,080 acres.

In the treaty with the Menominees (Wisconsin Indians) of Feb. 8, 1831 (Indian Laws and Treaties, Vol. 2, page 228), a proviso was inserted by the United States Senate (Indian Laws and Treaties, Vol. 2, page 233) setting apart the said two townships of land on the east side of Lake Winnebago for the Stockbridge and Munsee tribes.

Which provision for the Stockbridge Indians was confirmed by the treaty with the Menominees of Oct. 27, 1832 (Indian Laws and Treaties, Val. 2, pages 276-278).

By the treaty of Sept. 3, 1839 (Indian Laws and Treaties,

Vol. 2, page 391), the Stockbridge and Munsee Indians ceded the United States the east half of the two townships east of Lake Winnebago, and the United States agreed to pay one dollar an acre therefor, a part to be paid to the Stockbridge Indians remaining on the other half of the land, and a part to those who contemplated moving west of the Mississippi. The plan for the removal west of the Mississippi did not materialize, and by the Act of Congress of March 3, 1843, it was provided that the lands east of Lake Winnebago "may be partitioned and divided among the different Indians composing said tribe of Stockbridge Indians, and may be held by them separately and severally **in fee simple**, after such division." A board of commissioners of five of the tribe was provided for to make the distribution, and thereupon by section 7 of the Act the Indians were to become citizens of the United States and the Territory of Wisconsin.

A portion of the Indians not desiring to avail themselves of the provisions of this Act, it was repealed by the Act of Aug. 6, 1846, and on Nov. 24, 1848, a new treaty was entered into with the Stockbridge Indians. (Indian Laws and Treaties, Vol. 2, page 425.) The Act of 1846 had attepted to provide for the dividing of the township into two parts, one to be held by the Indian citizens of the United States, the other by the party desiring to keep up the tribal organization. But the white people had rushed in under the provisions of the law of 1843, and as recited in the treaty of 1848, it was found impracticable to carry the provisions of the Act of Aug. 6, 1846, into effect. By this treaty of 1848 the Stockbridge tribe of Indians sold to the United States all lands east of Lake Winnebago which had not been alloted to the Indians who had become citizens of the United States, the United States agreeing to pay therefor $31,004.85, and the additional sum of $5,000 indemnity for certain lands on White river in the state of Indiana. The Indians were not satisfied to move to the lands set apart for them west of the Mississippi (in Missouri, See Article 2, Treaty of Jan. 15, 1838, with the New York Indians), and also refused to remove to another location in Minnesota, which the government offered them, and they applied for a retrocession to them of the township of Stockbridge, which the United States refused, and thereupon, after considerable negotiations, the Stockbridge and Munsee Indians entered into the treaty of Feb. 5, 1856, with the United States. (Indian Laws and Treaties, Vol. 2, page 556.)

TREATY OF 1856.

By this treaty the Stockbridge and Munsee tribes and all the individual members of said tribes ceded and relinquished to the United States all their right and title in the lands in the town of Stockbridge, Wisconsin (east of Lake Winnebago), and in the 72 sections of land in Minnesota, and in and to the $20,000 and the $16,500 to be paid them by the United States under Article 9, Treaty of 1848, and also released all claims of the tribes and of **the individual members** of the tribes to the annuities of which they had been deprived since the year 1843. (See Article 1 of Treaty.) In consideration thereof, by Article 2, the United States was to select and give them a tract of land in the state of Wisconsin, in the southern part of the Menominee Reservation, of sufficient extent to provide for each head of a family and others lots of land of 80 and 40 acres.

By Article 3 the United States was to cause the lands to be surveyed, and the council of the Stockbridges and Munsees, under the direction of the Superintendent of Indian Affairs, were to make a fair and just allotment among the individuals and families of the tribes. Each head of a family was to have eighty acres or more, if the family contained over four members. Allotments to single persons were also provided for. It was further provided:

"After the said allotment is made, the persons entitled to land may take immediate possession thereof, and the United States will thenceforth and until the issuing of the patents as hereinafter provided hold the same in trust for such persons, and certificates shall be issued in suitable form guaranteeing and securing to the holders their possession and **the ultimate title to the land**; but such certificates shall not be assignable, and shall contain a clause expressly prohibiting the sale or transfer by the holder of the land described therein. After the expiration of ten years, upon the application of the holder of such certificate made with the consent of the said Stockbridge and Munsee council, and when it shall appear prudent and for his or her welfare, the President of the United States may direct that such restriction on the power of sale shall be withdrawn and a patent issued of the usual form. Should any of the heads of families die before the issuing of certificates or patents herein provided for, the same shall issue to their heirs; and if the holder of any such certificate shall die without heirs, his or her land **shall not revert to the United States.**"

It appears from the accompanying report of Francis Huebschmann (Indian Laws and Treaties, Vol. 2, page 565), who negotiated the treaty, that it was intended by the government to give immediate patents to the individual Indians of these lands in the southern part of the Menominee Reservation; that the provision for deferring the patents for ten years was inserted solely at the suggestion of a portion of the Indians themselves.

That is, so far as the United States and the Indians were concerned, this was intended to be a valid grant to the individual Indians and their heirs forever for valuable consideration of the three townships in the southern part of the Menominee Reservation. The title so created was not an ordinary Indian title, and was not one of occupancy alone, but was a grant of an interest forever, for a valuable consideration, and for the benefit of the individual members of the tribe.

The United States guaranteeing and securing to the individual holders of the selections or allotments "**ultimate title**," and it being expressly provided that patents should go, in case of the death of the allottee to his heirs, and "should not revert to the United States."

This was no recognition by the government of the mere right of occupancy by wild and untutored savages of a large part of the national domain.

It was a binding agreement, for a valid consideration, between the United States and a small number of christianized and civilized Indians, who gave up many thousands of dollars which the United States then owed them, in exchange for two townships of land, which was to be distributed between the individual Indians, and they were guaranteed the ultimate title thereto, it being further provided that it should not revert to the United States.

Contemporary history furnishes evidence of the civilization and progress of this people at the time of the treaty.

"These tribes—indeed, it may be said, this tribe (the Stockbridges), for of the Munsees there probably remain not more than half a dozen souls—were formerly an intelligent, prosperous people, not a whit behind the most advanced of the race, possessed of good farms, well instructed and industrious. Unfortunately for them, though much to the advantage of the government, which acquired thereby a valuable tract of country for white settlement, they removed in 1857 to their present

place of abode. The change has proved highly detrimental to their interests and prospects. Their new reservation, the greater part poor in soil and seriously affected by wet seasons and frequent frosts, has never yielded them more than a meager sustenance."

A Century of Dishonor, by Helen Jackson, page 416.

After the treaty of 1856, the Stockbridges and Munsees moved on to their new grant and alloted the lands to the heads of families and individuals of the tribe.

2nd Find of Fact, Printed Record, page 10.

Opinion of trial judge, page 14.

Of course the allotments did not take all of the two townships, and as new families grew up further allotments were made.

It is also undoubtedly true that a number of the Indians preferred to live in little settlements or towns on their land, and all of them did not live on their respective allotments.

The government did not and does not contribute to their support, except that on the sale of a part of the unalloted lands under the Act of Feb. 6, 1871, there has been created a small fund, the income of which gives them about $5.80 each per year.

See Appendix A. to this brief.

The Indians finding it difficult to subsist on the wild and timbered lands of the new reservation, Congress passed the Act of Feb. 6, 1871 (Vol. 1, Indian Laws and Treaties, page 128), for the sale of all but eighteen (18) sections, being the "18 contiguous sections embracing such as are now actually occupied and improved," which the Secretary of the Interior was authorized to reserve from sale.

Whether or not this Act was valid in as far as it affected unoccupied lands is perhaps immateral, especially as the sale of a township and a half seems to have been ratified by the acceptance of the annual income from the fund produced by such sale. It, however, seems to us too clear for argument, that the act did not and could not affect the rights of Indians of the tribe in and to their allotments which were grants to them for a valid consideration, and with the guaranty of the United States that they should have ultimate title, and the further provision that such title should not revert to the United States.

In case of the allotments, the allotees were then in possession, and held and had the full equitable title to and beneficial

use of the land and were guaranteed the ultimate title, and the United States retained no interest therein, other than the bare legal title, which for a consideration they were bound ultimately to transfer to the individuals of the tribes by patent.

Further, under that Act, the government never attempted to dispose of the 18 sections of occupied land, and the Indians never consented to any disposal thereof, and the right and title of the individual Indians thereto has since been recognized and reaffirmed by the Acts of March 3, 1893, (27 Statutes 744) and June 21, 1906 (34 Statutes 382).

It was evidently contemplated by the Act of 1871 that a part of the fund from the sale of the lands might be used in procuring new lands for the Indians (sec. 5 of the Act), and by section 7 it was provided that they "may be located upon lands reserved by the second section of this Act (clearly meaning the unalloted part of the 18 sections) or such other reservation as may be prescribed for them, with the assent of the council of said tribe."

And by section 8 provision was made for alloting any new lands that might be purchased for them "either at their present home or elsewhere," meaning new lands that they might acquire in their then home on the Menominee Reservation, which contained some nine or ten townships, or in some other part of the country; and by section 9 it was provided "thereafter the title of the lands described therein shall be held by the United States in trust for individuals and their heirs to whom the same were alloted."

In the main, the Act of 1871 was doubtless intended to be a confirmation of the rights of the individual Indians in their allotments, and to enable the Indians to dispose of some of the unalloted lands, so as to secure a fund for their support, or if they preferred to purchase additional and better lands elsewhere.

The act, however, could not affect the contract and vested rights of individual Indians in their allotments, and this proposition is not at all antagnostic to the general power of Congress to legislate contrary to the terms of treaties with other nations or Indian tribes.

By the Act of March 3, 1893 (27 Statutes 744) it was provided that all members of the tribe who entered into possession of the lands under allotments of 1856 or 1871 and who by themselves or their lawful heirs have resided on said lands since

be declared to be owners of such lands in fee simple in severalty, and it was provided that the allotments of 1856 should prevail over any conflicting allotments of 1871.

This Act shows that Congress never intended to in any way abrogate the treaty of 1856 by the Act of 1871, except as they provided a way for the Indians to dispose of a portion of the reservation if they so desired, and reaffirms the validity of the treaty of 1856 and the rights of the allotees thereunder, as being superior to the rights of any contesting allotees under the Act of 1871, and recognizing the principal we contend for, to-wit: That the Act of 1871 could not affect the allotments and rights under the treaty of 1856, and that insofar as the Act of 1871 may have attempted so to do, it was void.

By the Act of June 21, 1906 (34 Statutes 382), the United States has ratified and reaffirmed not only the treaty of 1856, but the allotments made by the Indians thereunder, and has directed the issuing of patents in fee simple therefor, and has made the allotments obligatory upon the members of the tribe who have made a selection of land within the reservation, whether filed with the tribal authorities or otherwise.

This Act is important here, not because it creates new rights, but because it is a practical construction of the rights of the allotees under the treaty of 1856 and the Act of 1871, in accordance with the claims always made by the Indian allotees, that is, that their allotments were valid, and that the individual allotees were the owners of the land rightfully entitled to the possession of it, and ultimately entitled to patents therefor.

The Stockbridges had done all that was required on their part under the treaty of 1856 in regard to making the allotments, the allotees had constantly asserted ownership, and the adoption by the United States, by the Act of 1906, of the same construction of the rights of the allotees as had been long claimed by them is a construction by the parties of the rights of the allotees in their favor and as such a construction of their rights is a proper subject for consideration by the courts.

The timber, for the value of which the United States government sued the defendant below, was cut on alloted lands by two allotees, Thomas Gardner and Daniel Davids.

Their allotments were made long prior to the acts alleged in the complaint (January, 1899), and under the treaties and arrangements between the Stockbridge and Munsee Indians and the United States.

Finding of Fact No. 2, Record, page 10.

There were members of the tribe, heads of families, and the allotments were made to them respectively, as their separate and individual allotments.

Record, page 11.

They thereupon entered into immediate possession of their respective allotments and ever after claimed to own the same as their allotments, and have constantly asserted their ownership and right to take timber therefrom under said treaty.

Finding of Fact, No. 3, page 11.

Their respective rights to the occupancy of the land alloted to them has been recognized and protected by the United States.

Finding of Fact 4, Record, page 11.

The allotees have always and constantly asserted ownership and right to take timber.

Judge Seaman's opinion, Record, page 14.

The timber in this case was cut "for the purpose of providing means for the support of their families;" was done in good faith; each of them claiming and believing that he had the right to so cut for said purpose.

Finding 5, Record, page 11.

After the cutting, the allotees sold the same to the defendant, who bought in good faith.

Findings 6 and 7, Record, page 11.

As stated in the opinion of Judge Seaman, the allotees had always claimed the right to cut timber on their allotments, and it was not for many years after 1856 that their right was questioned.

Their lands were a part of the original Menominee Reservation. The Menominees had only the right of occupancy. The government was exercising control over their (the Menominees') timber, and the real fact is that in the course of time the succeeding Indian Superintendents failed to distinguish between the different kinds of title. The result was that this suit, as well as several others, including certain criminal proceedings against the allotees themselves were commenced in the fore part of 1902. And the fact is, that these suits were commenced on the theory that these allotees had no other rights than the ordinary Indian title of occupancy, and that the United States was entitled to recover in its own name and for its own benefit the value of the timber, under the case of Cook

against the United States, 19 Wallace 592. Such being the statement made in the printed forms for propositions of settlement furnished by the government to those who had purchased logs from the Indians.

THE GOVERNMENT'S POSITION IN THIS CASE.

After investigation, the United States has decided to dismiss the companion case against the Torrey Cedar Company, being No. 100 on the calendar of the October Term, 1906, and has also decided in this cast not to ask a recovery for the logs cut upon the selection of Thomas Gardner.

United States brief, pages 26-39.

And stipulation of dismissal in Case No. 100.

This is, as we understand it, because the allotees in the Torrey Cedar Company case, and the allotee, Thomas Gardner, in this case, are conceded to have been, under the act of 1893, owners in fee simple of their respective allotments.

THE QUESTION HERE.

The sole question here then is, as to the right of the government to collect, in this action, from the defendant for the logs cut upon the allotment of Daniel Davids.

There being no bill of exceptions here, we take it that the judgment of the lower court should be sustained, unless it is contrary to the reasonable intendment of the facts found and stipulated.

We concede that in the stipulation and in the findings there is no statement of the exact date when Daniel Davids' allotment was made to him. Neither have we the exact information as to the actual date.

We think, however, that the only reasonable construction of the findings and stipulations is that Daniel Davids' allotment was made under the treaty of 1856, and prior to 1893, the court having found that it was made long prior to the acts alleged in the complaint (A. D., 1899) and that it was done "under the treaties and arrangements with the United States."

Finding 2, Record, page 10.

"That thereupon Daniel Davids entered into immedate possession" of his allotment, and has ever since claimed to hold the same as his allotment, and has constantly asserted his ownership and right to take the timber therefrom "under the said treaty and arrangements with the plaintiff."

Finding No. 3, Record, page 11.

Daniel Davids' right to the occupancy of the parcel claimed and held by him has been recognzed by the government, and his right to the occupancy of his allotment has been recognized by the United States.

Finding 4, page 11.

It is conceded that Daniel Davids had no house on his allotment.

Finding 9, Record, page 12.

And the government's claim, as I understand it, is, that because Daniel Davids has not "resided on said lands continuously since" entering into possession of his allotment, that he is not entitled to a patent under the act of March 3, 1893, as the other allotees in this case and in the other cases are now conceded to be.

It is a verity in this case that the cutting of timber by Daniel Davids was done **"for the purpose of providing means for the support of his family"** and in good faith, he claiming and believing that he had the right to so cut for said purpose.

THE CONTENTION OF THE GOVERNMENT.

The position of the United States in this case simmers down to this: **that because Daniel Davids did not reside on his allotment, he is not within the provisions of the act of 1893.**

And that under the treaty of 1856 his right in the land was "a mere right occupancy."

United States brief, page 29.

That therefore the United States, **in its own right,** was the owner of the land and timber and entitled in this action to recover for its own benefit, under the case of United States vs. Cook, 19 Wall. 592.

ARGUMENT.

The contention of counsel for the Government that the allotees among the Stockbridge and Munsee Indians had no right to cut timber on their allotments, except for the purpose of preparing the ground for agriculture, seems to rest solely upon the supposition that the decision of the Supreme Court of the United States in the case of U. S. vs. Cook, 19 Wallace, page 591, is applicable thereto.

Therefore, it seems that the primary question to be here determined is whether or not such rule is applicable to the facts in these cases and if not what the proper rule is.

That case arose on the Oneida reservation. In their statement the Supreme Court call attention to the fact that the Oneidas held their lands under the same tenure as the Menominees.

As a matter of fact the treaty with the Oneidas of 1838, (Indian Affairs, Laws and Treaties, Vol. 2, page 382), in Article Two, specifically provided that the Oneida lands should be "held as other Indian lands are held."

The right of the United States to recover in that action was based upon the fact that the Indians had only **the right of occupancy**; that the remainder was in the United States and that their respective rights were to be determined **by the ordinary rules of law applicable to tenants for life and remainder men**, and that because such a tenant would not be allowed to commit waste or cut timber that an Indian tribe or Indians of a tribe would under their right of occupancy have no such right; that such cutting would be waste and timber cut the property of the remainder man, in that case the United States.

The two essential facts in that case were that the Indians had only the right of occupancy, and that the United States, holding the remainder, was the owner and entitled to recover the timber.

We contend that the title of the Stockbridge and Munsee Indians to their lands is entirely different; that under the treaty of 1856, (Laws and Treaties, Vol. 2, page 556, and 11th Stat.-at-Large, 663), both the rights of the Indians and of the United States were intentionally made different from the ordinary arrangements as to Indian lands. That is, as we understand that treaty, the whole equitable and beneficial title and interest, together with the right of possession, was given to the Indians and it was specially provided that said lands should not revert to the United States, and the United States guaranteed an ultimate title to the Indians, and after the making of such treaty the United States remained the mere repositary of the legal title for the sole purpose of transferring it at the request of the council and the president to the individual Indians. That is, the United States had no beneficial interest in the land, neither had it as trustee any duty in the premises to perform, neither had it any duty or charge as to the property, except to convey the legal title to the individuals when the council and the president so requested. The United States had and has, on its own account, no interest whatever in the lands, and no possible right by way of reversion or remainder.

It is therefore clearly evident that there was and is a difference between the title and rights of the Stockbridge and Munsee Indians under their treaty, and that of tribes holding, as the phrase is, "As other Indian lands are held."

But in the case of United States vs. Cook, another question was incidentally decided, and that is this: That the rights of the Indians and of the United States are to be determined, not upon the ground that Indians are Indians, but are to be determined upon the familiar principles of law applicable to all persons. (See opinion in that case, page 594.) That is, that the rights of the Indians to the estate granted them are the same as the rights of citizens of the United States holding similar estates, and in the case of the United States vs. Cook, the estate of the ordinary Indian tribe, which is merely a right of occupancy, was held to carry with it the rights of a tenant for life, because a tenant for life has similar rights of occupancy.

It is, we think, important, to examine carefully into the nature of the estate granted by the treaty to the Indians.

Of course it was ultimately intended to give the Indians a fee simple in both the legal and equitable estate, but the patents not having been issued, the question is, what was the right and estate of the Indians prior to the issuing of such patent.

As to this the treaty provides: (See Article Three).

First. The land was to be alloted among the individuals.

Second. Each individual was to take immediate possession.

Third. The United States was to guarantee and to secure to the holders of allotments their possession, **and an ultimate title to the land.**

Fourth. Should an allotee die his right should pass to his heirs.

Fifth. In case of his death without heirs, the lands should not revert to the United States.

Sixth.—The treaty was a contract for which the Indians paid a valuable consideration (See Article 1 of the Treaty), by ceding the United States their interest in divers tracts of lands and giving the United States many thousands of dollars then due them, including the giving up by the Indians of the tribe of their then unpaid annuities.

Seventh. There was no limitation or restriction upon the use of the allotee of his lands.

Eighth. The treaty was in effect in part a land contract for a valuable consideration, and such agreements to convey and conveyances may be made by treaty.

Holden vs. Joy, 17 Wall. 211-247.

Ninth. The contract part of the treaty based on a valid consideration could not be disturbed by Congress.

Tenth. The contract was between the United States and christianized and civilized Indians.

Eleventh. The provision for the withholding of the patent for a time was placed in the treaty agreement at the request of the Indians themselves and for their benefit, and not for the purpose of reserving any right, title or interest in the United States for the benefit or use of the United States.

Francis Huebschmann statement, Indian Laws and Treaties, Vol. 2, ,page 565.

Even under the Act of February 6, 1871 (which manifestly could not affect the vested estates of the individual Indians for which a consideration had been paid to the government, nor disturb the contract rights of the allotees provided by the treaty), it was in section 9 of the Act provided that "the title to the lands described therein shall be held by the United States in trust for individuals and their heirs, to whom the same were alloted."

So that in no case can we conceive of counsel for the government being correct when they speak of the allotee's title as "a mere right of occupancy."

The estate of the individual Indian was one in himself and his heirs, liable only to be defeated by the failure of heirs, and in that case the remainder over, not to the United States, but to the tribe, to be disposed of by its council, (which carried with it all equitable and beneficial rights, including the right of possession and use and everything, except the naked legal title, which should repose temporarily in the United States for the benefit, however, of such Indian).

Therefore, if we are to inquire into the rights of such Indians by determining the rights of holders of similar estates under the ordinary rules of law, we see that here there was created no mere estate at will or by sufferance, which might be the case in lands "held as other Indian lands are held," neither was the estate hereby created limited to the life of the possessor, but it was an estate which under the terms of the

treaty, at the very least, must continue, not only during the life of the person who went into possession, but as long as there were heirs of his to hold it. It seems to us that it was without any question an estate in fee. Of course his right was not in fee simple, because it might be terminated by there being no heirs, when it would revert to the tribe for disposition, but it was an estate in fee "because it might endure forever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances (the existence of heirs), which qualify and debase the purity of the donation, it is therefore a qualified or base fee."

Am. & Eng. Ency. of Law, 2nd ed., Vol. 11, page 368.
2 Blackstone's Com. 109.

It has always been the law, however, "that while this estate (tenancy under a base or qualified fee) continues, and until the qualification upon which it is limited, is at an end, the grantee has the same rights and privileges over his estate as if it were a fee simple."

See Am. & Eng. Ency. of Law, 2nd ed. Vol. 2, pages 369-370.
State vs. Brown, 27 N. J. Law 13.
1 Cruise 52, Tit. 1, sec. 86.

It is also evident that the right conveyed by the treaty, pending the issuing of a patent, was of greater extent than the estate of a tenant in tail, because under the treaty the rights were limited to the person and his heirs generally, while in a tenancy in fee tail the estate is limited to the heirs of his body.

It has always been the rule of law that a tenant in tail as against his remainder man and as against the world, had the right to cut timber on his land for any purpose. That is, such a tenant could not commit waste.

Blackstone says in his Commentaries, Book 2, page 115, "The incidents to a tenancy in tail are chiefly these: 1. That a tenant in tail may commit waste on the estate tail by felling timber, pulling down houses, or the like, without being impeached or called to account of the same."

See also Am. & Eng. Ency. of Law, 8nd ed., Vol II, page 374 ee.

The incidents to this estate were, first, that a tenancy in tail was not liable for waste.

See also Coke on Littleton, 224a.

That the treaty was an agreement founded upon a valuable consideration; that it was thereby intended that the Indians should take the full estate we have described, and that the lands should not revert to the United States, is, we think, plain on the face of the treaty. In fact, we consider it indisputable, but if there were any doubt, it would be removed by reading the accompanying report of Francis Huebschmann, from which it appears that the government, when it negotiated the treaty intended and desired to give the individual Indians full legal title and patents at once; that one Quinney, an Indian, objected thereto, and that to obviate his objection the provision for delaying the patents until the general council of the tribe should request it was inserted. (See Indian Affairs, Laws and Treaties, Vol. 2, page 565; 11th Stats.-at-Large, 673.)

Is it not, then, perfectly plain that the title intended to be given and given to the Stockbridge and Munsee Indians was not that of ordinary Indians, and was not to be held as other Indian lands are held, but that there was granted and conveyed to them at once all beneficial and equitable estate, with the immediate right of possession and use, the individual Indian taking his selection virtually in fee, with the agreement that ultimately the full legal title temporarily reposed in the United States, should pass to him, with the bare possibility that the estate of himself and his heirs might be defeated by the failure of heirs before the issuing of a patent, and then the remainder to the tribe for its disposition. The individual Indian, as to his selection or allotment, standing then, until the issuing of the patent, with a greater estate than a tenant in tail, should he not have at least the rights of such tenant?

In United States vs. Reese, 5 Dill. 405, the question involved the title of the Cherokees to their lands. Their treaty granted them the lands forever, provided always that the lands should revert to the United States, if the Indians should become extinct or abandon the same. It was held that the condition as to abandonment made the Indian title a base or qualified one. That there was only a possibility of reversion to the United States, that therefore all the estate was in the Indians, therefore that such lands could not be lands of the United States within the meaning of sec. 5388. And therefore the timber was not cut from the lands of the United States, nor did it belong to it.

If the question were to be decided, not strictly according to the rules of law affecting the possessors of different estates, but on the broad ground of intention of the parties, as shown

by the treaty, and considering the treaty as an agreement between a great and independent nation, and a small and dependent people, can it for a moment be doubted but what both parties thereto intended to provide thereby a permanent home for the individual members of the dependent nation to be used at their discretion for their support, with the one limitation that they should not be able for a time to convey away the legal title, and that provision solely for the benefit of the members of the dependent nation?

The lands affected were not argicultural, but were timber lands; neither could it be expected that they would use them otherwise than their white brethren would.

The Indians have no other means of support of any amount. (We presume the Court will take judicial notice of the Acts and Treaties whereby there is distributed during each year about five or six dollars to each Indian their share of the income on their funds held by the government. Appendix "A," hereto.

There was no agreement that they should become farmers. The land was wild. But was it not plainly the intention that they should get their living therefrom by their labor and in such way as they elected? Judge Drummond, in the case of United States vs. Foster, 2 Biss. 377, was of the opinion that Indians, even on the Oneida Reservation, had the right to cut timber for their support. Certainly it seems to us the Stockbridge and Munsee Indians clearly had that right under the treaty of 1856, and that they had the right to use it for hunting, fishing, tillage, fuel, wood and their ordinary support. If this was not the understanding and the intention and the meaning of the treaty, then indeed the government drove a hard bargain, for the possibility of the Indians supporting themselves otherwise on such lands was and is a slight one.

But in cutting the timber the Indian was not doing anything **malum in se**. He was carrying on an industry, which the white man of this country has long pursued without disgrace; he was learning to provide for the support of his family. As an illustration. In the Torrey Cedar Company case, the stumpage value of the timber was not over seventy-five or one hundred dollars, but by the labor put upon it there was received for the support of the Indian family for the year nearly three times that sum, two-thirds thereof being theresult o f his labor. It is stipulated in this case that the timber was only cut for the support of the Indian families, and since the Act of

March 3, 1883, it seems to me to have been impliedly recognized by statute that the result of such labor belongs not to the government of the tribe, but to the member performing it.

See sec 2, Act of March 3, 1883, 22 Stat.-at-Large 582, which provides: Sec. ***** The proceeds of all purchases and sales of **timber**, coal or other product of any Indian Reservation, except those of the five civilized tribes, and **not the result of labor of any member of such tribe** shall be converted into the Treasury for the benefit of such tribe. ******

The proceeds of the timber here was the result of the labor of the allotee, Daniel Davids, performed on his allotment, in the possession of which he then was, and his possession recognized and protected by the United States, and his interest in it existing by agreement for a valuable consideration, by the treaty of 1856, which gave him the possession of his allotment for just such use.

More than that, by the treaty it was contemplated that the land should not remain timber land. By Article 2 it was provided that every lot should contain at least one-half arable land.

The cutting of timber for the support of the allottee's family thus tended to bring the land into the very condition which it was provided it should be in under the treaty, and most certainly the government lost nothing thereby, because the government did not intend to retain and did not retain any title or interest for its own account. The withholding of the patent being only for the individual Indian's benefit and at the request of a part of the tribe. The government at the time of the treaty being then willing and intending to give the whole title in fee to the Indians.

And as I have said before, the United States has no beneficial interest in the matter, no duties to perform, and is the mere repository of the title until the council and the president direct it to convey the same, therefore being merely a holder of the title it has no interest in the matter. That is, no interest as an adverse claimant in and to the land. No interest in its own behalf.

The timber here has been cut. The question is, who is entitled to it, or to its value? Really it is a question between the individual and the tribe, because it belonged either to the individual Indian or to the tribe, as a possible remainderman. In no event does it belong to the United States, and I believe we have shown that under the treaty and under rules of law

applicable thereunder, it is the property of the individual Indian.

In what has been said so far with reference to the United States standing in the the matter, we have been speaking merely of its rights under the treaty; as to its relation to the Indian as guardian we will speak later, but first a word as to the,

ALLOTMENTS.

On the record here the findings of fact stand as a verity. That the allotment to Daniel Davids was made by the headmen or council of the Indians under the treaties and arrangements with the United States is a verity. Likewise the fact that he entered into immediate possession thereof, and has always since claimed the same.

Under Article Three of the treaty, it was provided that the council of the Indians under the direction of the superintendent should make an allotment among the individuals.

It is found in this case that the council of the Indians did make such allotment, and have confirmed to the individuals their allotments or selections.

It is further found that such persons have taken possession thereof.

An allotment having been made by the Indians, we think it will be presumed to have been made as the law directed.

Best vs. Polk, 18 Wall. 112.

Here it was held that it was not necessary to show that all the minutiae, including the agent's certificate was duly carried out. As the grant raised a presumption that the incipient steps required to give it validity have been taken. Mr. Justice Davis stated in his opinion, even if the agent neglected to attach a proper certificate to the roll of the Indians entitled to the reservation, it is difficult to see how they could be prejudiced by this neglect.

If this presumption is not conclusive, even then the failure of the superintendent for so many years to perform his duty and direct the method of allotment, could not prejudice the equitable rights of the Indians. The obligation to make such allotments was imperative and founded, as was the treaty, upon a valuable consideration. The agreement was one which if entered into by an individual a court would enforce. The obligation is not the less imperative and binding entered into

by the government? The equitable right of the allottee at least is perfect. The objection would be technical and of no weight.

Crews vs. Burchan, 1 Black 352, decision by Justice Nelson.

Again the facts are that the government has recognized the allotments by the Indian council to the Indians, by protecting the individuals in the possession of their allotments or selections, and in any event such a recognition is a waiver of any right to insist upon the irregularity, if any there was.

Again neither the tribe, the government or any Indian objects to the allotments made and so there would be a waiver of any such irregularity by common consent. So that I feel free in saying that the allotments, made as shown in this case, give to the possessor all of the rights granted to the allottees under the treaty, and I think they are now entitled to the certificates therein provided for, and under the Act of 1906, are now entitled to patents.

THE ACT OF FEBRUARY 8, 1887, (24 STATUTES 388.)

The Act of 1887 created different rights than those of the Stockbridge and Munsee Indians under the treaty of 1856.

By section 5 of the Act of 1887, it was expressly provided that "any contract touching the same" (the alloted lands) should be null and void. While under the Stockbridge and Munsee treaty of 1856 there was no limitation or restriction whatever on the use by the allotees of the land or the timber thereon.

Again, under the Act of 1887, Congress was providing the terms of a gift it was to make, and could withhold from the allotees any rights or title it saw fit.

But in the Stockbridge and Munsee treaty the United States was virtually selling the land for a consideration, and the retaining of the legal title was not for the purpose of keeping an interest in the government for its own benefit, but was a mere provision put in at the suggestion of the Indians for their benefit. And under the Stockbridge and Munsee treaties and arrangements no interest remained in the government except the bare legal title held solely for the benefit of the allotees.

The case of United States vs. Gardner, 133 Fed. Rep. 285, cited by counsel for United States, arose over certain lands in the Colville Reservation.

The Act of July 1, 1892 (27 Statutes 62) expressly provided in section 8 "that nothing herein contained shall be construed as recognizing title or ownership of said Indians to any part of the said Colville Reservation." That is, in the Colville Reservation case, Congress expressly provided no title or ownership should pass to the Indians. It was not a contract founded on a valuable consideration. The Indians there, as recipients of a promised gift, had no right except at the pleasure of the donor.

And it is always the right of the giver to place any desired conditions or restrictions on the gift or to withdraw the promise before execution.

But in our case the treaty was in effect a land contract for a valuable consideration. As far as the United States retaining any interest or title for its own benefit is concerned, it may be unqualifiedly said that there was no such intention or agreement.

The United States proposition was, for valuable considerations, to give the land in fee simple to the individual Indians to whom it should be alloted. The government was ready and willing at the time of the treaty to give the patents. And it holds the legal title since for the Indians' benefit and at their request, and not for the purpose of securing or retaining any interest whatever in the government.

Therefore, we say, that neither the Act of 1887, nor the decision of United States vs. Gardner supra, has any bearing on this case.

This action, as we have stated before, is an action at law, commenced by the government to recover from the defendant on the theory that this timber belonged to the government as remainder man, and that the Indians had no interest therein, because their right was only one of occupancy, which would not authorize them to commit waste.

We believe this view of the government's to have been misconceived.

We believe that not only the land, but the timber as well, belong in equity to the allotees, that they were the sole equitable owners thereof, and entitled to the possession and use thereof to themselves and their heirs, and ultimately were entitled, as a matter of right—not of favor—to patents giving them the full legal title as well.

That there was no remainder to the United States. Nothing more than the possibility of an escheat, which is common to every title.

That therefore the United States, suing as it does here in its own behalf, had and has no claim to the proceeds of the timber because it was not in its own behalf the owner thereof.

That is, the United States does not own the remainder. The rights of the Indians here are more than rights of mere occupancy.

THE INDIANS AS WARDS OF THE GOVERNMENT.

There is no question but what the Indian tribes are wards of the United States; that they are communities dependent on the United States.

Lone Wolf vs. Hitchcock, 187 U. S. 553.

There is no question but what the United States has the right and that it is its duty to act as guardian for them and to protect their rights.

Neither is it disputed that the United States may sue at law or in equity, or take any other proper step, as guardian, to protect their persons or their property.

Neither do we question the right of the United States, as guardian, either by treaty or by Act of Congress, to regulate the making of contracts with the Indians.

Nevertheless the Indians are not to be put in a class with minors or the insane.

The Indians have, unless restricted by treaty, or the Act of Congress, or public policy, the right to contract for themselves. That is, they are not incompetent to make a contract, unless it is so declared.

Their rights to make contracts, for their necessaries and supplies, contracts for the sale of their products and the like, has never been questioned. So, where it is not prohibited, their sales of real estate under title from the government, has been upheld.

Crows vs. Burchan, 1 Black 352.
Doe vs. Wilson, 23 How. 457.

Of course, it is probably true because of the condition of the Indian, that any contract whatever made with him, is liable to be questioned by the United States, as guardian, in a proper proceeding, and that it is liable to be avoided, because of fraud or overreaching, but all contracts with the Indians not expres-

ly prohibited are, I think, good and valid, unless tainted with fraud or overreaching.

So in the case at bar I do not see that the fact that the United States is the guardian and that the Indian is the ward in the sense in which these terms are used in the law, in any way, in this case can affect the purchaser of the cut timber from the Indian, if he had the lawful right to cut the same.

In this case there was no "over-reaching in any manner;" the logs were bought by the defendant in good faith.

Opinion of trial court, Record, page 17.

The defendant paid a valuable and fair consideration.

6th Finding, Record, page 11.

Neither Congress, the President, nor the Department as guardian of the Indians ever attempted to exert their control as guardian to in any way interfere with the cutting of this timber nor its purchase by the defendant until the time of the commencement of this suit in 1902, three years after the cutting.

Opinion of lower court, Record, page 17.

Stipulation, Record, page 9.

Complaint, Record, page 2.

The Indians had cut and sold timber for many years.

And until the government as guardian prescribed regulations in the matter, the allotee, though an Indian, could make valid contracts for the disposition of the product of his land, and such contracts would only be reviewable by the government in a suit as guardian or trustee, and then only where there had been over-reaching, fraud or inadequate consideration. None of which exist in this case.

This suit is not brought by the government as the guardian or trustee of the Indians, nor for their benefit.

It is brought solely on the theory that the Indian rights were merely rights of occupancy, and that the government as remainder man was itself and for its own benefit entitled to sue for and recover the value of the timber. Such are the allegations of the complaint.

Record, page 2.

Such is the theory upon which the case has been maintained.

Opinion of lower court, Record, page 14.

Brief of United States, Record, pages 29-32.

We respectfully submti, that under the facts found this action cannot be maintained by the United States.

ACT OF 1906.

The Indians have always claimed that their allotments were valid, that under the contract treaty of 1856, the government only held the bare legal title for their benefit, and that they were in effect purchasers of this land, and the individual allotees the sole beneficial and equitable owners thereof, the only restriction on their exercise of ownership being their lack of power to alienate the fee before their patents issued.

"The allotees have constantly asserted ownership and right to take the timber without restriction under the treaty."

Opinion of the trial court, Record, page 14.

They had up to the bringing of these suits in 1902 exercised their claimed right of cutting the timber and the government had recognized them as allotees.

By the Act of 1906 the government adopted the construction put upon the treaty of 1856 by the Indians as correct, and by that Act the allotments are to be held by them in fee simple.

All of this is, we think, a construction of the terms of the contract treaty by the parties and in accordance with the position of the allotees.

The court should, we think, adopt the construction thus put upon the treaty by both parties thereto.

MEASURE OF DAMAGES.

Counsel for the government mentions the question of "measure of damages."

The findings of the trial court being to the effect that the logs were cut by Daniel Davids in good faith, he claiming and believing that he had the right to so cut them, and that the defendant bought the same in good faith, believing said Daniel Davids to be the bona fide owner, and that the same were bought for a valuable and fair consideration, it is, we believe, the settled law that the plaintiff could, in any event, recover no more than the stumpage value.

United States vs. St. Anthony R. R. Co., 192 U. S. 524;
Durant Mining Co. vs. Percy Mining Co., 93 Fed. Rep. 166;
Gentry vs. United States, 101 Fed. Rep. 51;

In United States vs. Cook, 106 U. S. 432, where this court held a purchaser liable for a higher measure of damages, the certificate of facts upon which that case came to this court certified that the timber was knowingly and wrongfully taken from the lands by the Indians.

IN CONCLUSION.

We submit that the rights of the allotees here were greater than a "mere right of occupancy."

That the United States does not stand as the remainder man and has no interest in its own behalf in the land or timber.

That there was nothing to prevent the United States conveying a virtual fee to these allotees by treaty.

Delaware Indians vs. Cherokee Nation, 193 U. S. 129-136.

That the treaty of 1856 was a contract with the Indians for a valuable consideration, vesting in them rights in the land which cannot be divested without their consent.

That until the government as guardian places restrictions upon them, the allotees under such treaty have the right to cut and sell the timber on their allotments, subject to the right of the government as guardian to inquire into the fairness and reasonableness of their contracts for the disposal thereof.

That such is the construction placed upon the treaties by the parties.

That the judgment of the lower court is right on the record, and should be affirmed.

Respectfully submitted,

CHARLES BARBER,
For the Paine Lumber Company.

J. C. THOMPSON,
Of Counsel.

APPENDIX "A."

Department of the Interior, United States Indian Service.
Green Bay Agency, Keshena Wis., March 6, 1906.

Thompson, Thompson & Pinkerton,
Attorneys at Law,
Oshkosh, Wisconsin.

Gentlemen:

Your letter of the 3rd instant at hand and contents noted.

In reply you are informed that the membership of the Stockbridge and Munsee Indians under my jurisdiction is about 550; that they receive semi-annual annuity payments; that the amount of each payment is $1,599.71; that the share received by each member is about $2.90 each payment, or a total of about $5.80 per year; that they receive no other benefits from the Government, other than the small amount provided for the carrying on of a day school for the benefit of their children.

Trusting that this will cover the information desired, I remain,

Yours truly,

SHEPARD FREEMAN,
Supt. & Spl. Disb. Agt.

Dict. C. N. F.
(MWD)

Per C. N. F.

Supreme Court of the United States.

No. 101.—October Term, 1906.

The United States, Plaintiff in Error, vs. The Paine Lumber Company. } In error to the Circuit Court of the United States for the Eastern District of Wisconsin.

[May 27, 1907.]

Mr. Justice McKenna delivered the opinion of the Court.

Action by the United States against the Paine Lumber Company for the recovery of the value of a quantity of timber and logs, to wit: 7,500 feet of basswood; 6,500 feet of elm; 51,020 feet of pine logs, alleged to have been cut and removed from certain lands in the Eastern District of Wisconsin.

The answer, contained denials of the complaint, and set up that defendant company purchased the basswood and elm logs of one Thomas Gardner, and the pine logs of one Daniel Davids, in the fore part of 1899, the logs being at the time in the county of Shawano in Wisconsin, and being in possession of Gardner and Davids respectively, who claimed and represented themselves to be the sole and absolute owners thereof, and that defendant in the regular course of its business sold and disposed of them.

Defendant also pleaded payment of the sum of $271.37 in full satisfaction and accord.

The action was tried by the court, who found the following facts:

"That the defendant is and was during all the times mentioned in the complaint a duly incorporated Wisconsin corporation.

"That long prior to the commencement of this action and long prior to the acts alleged in the complaint the head men or council of the Stockbridge and Munsie Indians, claiming authority so to do under the treaties and arrangements with the United States, allotted to one Thomas Gardner the east half of the northwest quarter of section thirty-five (35), township twenty-eight (28), range fourteen (14) east, of the fourth principal meridian, of the State of Wisconsin, and to one Daniel Davids the northeast quarter of the southeast quarter of section twenty-one (21), township twenty-eight (28), range fourteen (14) east, of the fourth principal meridian, of the State of Wisconsin, said lands being a part of the tract of land given to the Stockbridge and Munsie Indians by the treaty of 1856, each of said Indians being a member of said tribe of Stockbridge and Munsie Indians and the head of a family, and the said allotments being made to them respectively as their separate and individual allotments and being the same lands described in the complaint herein.

"That thereupon Thomas Gardner and Daniel Davids entered into immediate possession of their respective allotments and each of them has ever since claimed to hold the same as his allotment and has constantly asserted his ownership and right to take the timber therefrom without restrictions under the said treaty and arrangements with the plaintiff.

"That no patent has ever been issued for either of said parcels of land and that the ownership of the same by said Indians has received no official sanction on the part of the plaintiff aside from the recognition of their respective rights to the occupancy of the parcels so claimed and held by them respectively as aforesaid.

"And that their respective rights to the occupancy of their respective parcels of land allotted to them as aforesaid has been recognized by the United States.

"That the timber and logs involved in this case, to wit, 7,500 feet of basswood, 6,500 of elm, and 51,020 feet of pine were cut in the winter of 1898–1899, upon said respective parcels of land by the said Thomas Gardner and the said Daniel Davids, respectively, not for the purpose of clearing the land for cultivation, but for the purpose of providing means for the support of their families, and that such cutting by each of them was done in good faith, and each of them claiming and believing that he had the right to so cut for said purpose.

"That after said cutting, and in the summer of 1899, at Weeds Point, in the county of Shawano, Wisconsin, the said logs were bought by the defendant of said Thomas Gardner and Daniel Davids, the same then and there being at said Weeds Point and off of the said reservation, for a valuable and fair consideration.

"That the defendant bought the same in good faith, believing the said Thomas Gardner and the said Daniel Davids were the bona fide and absolute owners thereof, and that they respectively were lawfully entitled to sell the logs cut from their respective allotments.

"That at the time of the cutting of the timber in question the said Thomas Gardner was living upon his said allotment; that shortly thereafter his wife died, and that he has not since lived thereon except at intervals of two or three months at a time, but for the most part has lived elsewhere with his brother.

"That at the time of the said cutting the said Daniel Davids had no house on his allotment and was only there at times temporarily.

"It is stipulated in this case that if defendant is liable for the value of the logs and timber at the time of taking or while in his hands that the measure of damages therefor be the sum of five hundred and sixty-six dollars and twenty-eight cents ($566.28), and that if it be liable for the value of said logs and timber at the time of the cutting thereof or at the time of the taking thereof by the defendant, less the additions in value made thereto by the Indians in cutting, hauling, and banking the same, then the measure of damages therefor shall be the sum of three hundred and seventy-eight dollars and fifty-nine cents ($378.59). The measure of damages in both cases includes the cost of the scale and estimate thereof made by the Government officials."

From these findings the conclusion of law was deduced:

"That the said Thomas Gardner and the said Daniel Davids, as such allottees, had the right to cut and sell the timber on their respective allot-

ments for the purpose for which the same was cut and sold, and that the defendant is entitled to judgment herein in its favor and against the plaintiff, dismissing the plaintiff's complaint on the merits, but without costs."

The court expressed the reasons for its judgment in an opinion of such circumstantial care and consideration that makes unnecessary an elaborate discussion by us. Fed. Rep. . It stated the primary issue to be "whether the Indian allottees under the Stockbridge and Munsie treaty of 1856 (11 Stat. 663) and the act of Congress of 1871 (16 Stat. 404) were vested with sufficient title in their allotments to authorize the cutting of timber, for sale and not by way of improvements, without the approval of the Department of the Interior." And stating the purpose of the treaty and its provisions, the court said:

"The Stockbridge and Munsie treaty of 1856 was entered into to provide for relocation of the remnant of the tribe in Wisconsin, as they were unwilling to remove to a reservation in Minnesota theretofore provided. It recites valuable retrocessions and releases to the United States and reserves a tract 'near the south boundary of the Menominee Reservation' of sufficient extent to furnish individual allotments. The terms of the grant were substantially these: After survey into the usual subdivisions the council of the tribes, under the direction of the superintendent, shall 'make a fair and just allotment among the individuals and families of their tribes,' in eighty-acre tracts to heads of families and other classes named, and forty acres to others. The allottees 'may take immediate possession thereof, and the United States will thenceforth and until the issuing of 'patents' hold the same in trust for such persons;' certificates are to be issued 'securing to the holders their possession and an ultimate title to the land;' but 'such certificates shall not be assignable, and shall contain a clause expressly prohibiting the sale or transfer by the holder' of such land. After ten years, upon application of the holder and consent of the council, 'and when it shall appear prudent and for his or her welfare, the President of the United States may direct that such restriction on the power of sale shall be withdrawn and a patent issued in the usual form.' In the event of the death of an allottee without heirs, before patent, the allotment was not to revert to the United States, but to the tribe for disposition by the council. It is further declared (art. 11): 'The object of this instrument being to advance the welfare and improvement of said Indians, it is agreed, if it prove insufficient, from causes that cannot now be foreseen, to effect these ends, then the President of the United States may, by and with the advice and consent of the Senate, adopt such policy in the management of their affairs as in his judgment may be most beneficial to them; or Congress may, hereafter, make such provisions of law as experience shall prove necessary."

And another act should be mentioned, as it has induced a concession by the plaintiff of the right of Gardner to cut the timber upon his allotment. It is provided by the act of March 3, 1893, (27 Stat. 744,) that all members of the tribe "who entered into possession of lands under the allot-

ments of eighteen hundred and fifty-six and of eighteen hundred and seventy-one, and who by themselves or by their lawful heirs have resided on said lands continuously since, are hereby declared to be owners of such lands in fee simple, in severalty, and the Government shall issue patents to them therefor."

It is contended that Davids is not within the act of 1893, and "that his title is only such as can be read out of the treaty of 1856 and the act of 1871." Granting this to be so, it hardly needs to be said that the allotments were intended to be of some use and benefit to the Indians. And, it will be observed, that on that use there is no restraint whatever. A restraint, however, is deduced from the provision against alienation, the supervision to which, it is asserted, the Indians are subject and the character of their title. It is contended that the right of the Indians is that of occupation only, and that the measure of power over the timber on their allotments is expressed in *United States* v. *Cook*, 19 Wall. 592. We do not regard that case as controlling. The ultimate conclusion of the court was determined by the limited right which the Indians had in the lands from which the timber there in controversy was cut.

Certain parties of the Oneida Indians ceded to the United States all the lands set apart to them, except a tract containing one hundred acres for each individual, or in all about 65,000 acres, which they reserved to themselves, *to be held as other Indian lands are held.* Some of the lands were held in severalty by individuals of the tribe with the consent of the tribe, but the timber sued for was cut by a small number of the tribe from a part of the reservation not occupied in severalty. It was held, citing *Johnson* v. *McIntosh*, 8 Wheat. 574, that the right of the Indians in the land from which the logs were taken was that of occupancy only. Necessarily the timber when cut "became the property of the United States absolutely, discharged of any rights of the Indians therein." It was hence concluded "the cutting was waste, and, in accordance with well-settled principles, the owner of the fee may seize the timber cut, arrest it by replevin, or proceed in trover for its conversion." If such were the title in the case at bar, such would be the conclusions. But such is not the title. We need not, however, exactly define it. It is certainly more than a right of mere occupation. The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. *Schly* v. *Clark*, 118 U. S. 250. The title is held by the United States, it is true, but it is held "in trust for individuals and their heirs to whom the same were allotted." The considerations, therefore, which determined the decision in *United States* v. *Cook* do not exist. The land is not the land of the United States, and the timber when cut did not become of the property of the United States. And we cannot

extend the restraint upon the alienation of the land to a restraint upon the sale of the timber consistently with a proper and beneficial use of the land by the Indians, a use which can in no way affect any interest of the United States. It was recognized in *United States* v. *Clark* that "in theory, at least," that land might be "better and more valuable with the timber off than with it on." Indeed, it may be said that arable land is of no use until the timber is off, and it was of arable land that the treaty contemplated the allotments would be made. We encounter difficulties and baffling inquiries when we concede a cutting for clearing the land for cultivation, and deny it for other purpose. At what time shall we date the preparation for cultivation and make the right to sell the timber depend? Must the axe immediately precede the plow and do no more than keep out of its way? And if that close relation be not always maintained, may the purpose of an allottee be questioned and referred to some advantage other than the cultivation of the land, and his title or that of his vendee to the timber be denied? Nor does the argument which makes the occupation of the land a test of the title to the timber seem to us more adequate to justify the qualification of the Indians' rights.

It is based upon the necessity of superintending the weakness of the Indians and protecting them from imposition. The argument proves too much. If the provision against alienation of the land be extended to timber cut for purposes other than the cultivation of the land it would extend to timber cut for the purpose of cultivation. What is there in the latter purpose to protect from imposition that there is not in the other? Shall we say such evil was contemplated and considered as counterbalanced by benefit? And what was the benefit? The allotments, as we have said, were to be of arable lands useless, may be, certainly improved by being clear of their timber, and yet, it is insisted, that this improvement may not be made, though it have the additional inducement of providing means for the support of the Indians and their families. We are unable to assent to this view.

Judgment affirmed.

Mr. Justice MOODY took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.